

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMUNIST PARTY OF THE UNITED STATES OF
AMERICA, PETITIONER

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 12

COMMUNIST PARTY OF THE UNITED STATES OF
AMERICA, PETITIONER

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The original opinion of the court of appeals (R. 2078-2166; Pet. App. A, pp. 1-89), Judge Bazelon dissenting, is reported at 223 F. 2d 531.

The opinion of this Court is reported at 351 U.S. 115.

Like petitioner, we shall use "R." to refer to the printed record (pages 1-2169) filed with this Court at the October Term 1955 (No. 48). It consists of the Joint Appendix to the parties' briefs when the case originally was before the court of appeals, and the original proceedings in that court. We shall also use "R." to refer to the record (pages 2175-2723) filed in this Court after the second grant of certiorari on February 5, 1960, consisting of the proceedings before the Sub-

The second opinion of the court of appeals (R. 2652-2680; Pet. App. A, pp. 91-121), Judge Bazelon dissenting in part and concurring in part, is reported at 254 F. 2d 314. A memorandum of the court of appeals having reference to this opinion (R. 2694-2695; Pet. App. A, pp. 122-123) and an order clarifying the latter memorandum (R. 2695-2697) are not reported.

The third opinion of the court of appeals (R. 2699-2707; Pet. App. A, pp. 124-132), Judge Bazelon dissenting in part and concurring in part, is reported at 277 F. 2d 78.

The original Report of the Subversive Activities Control Board appears at R. 1-137 [1803-2051].² The Modified Report of the Board appears at R. 2406-2651, and the Modified Report of the Board on Second Remand appears at R. 2375-2405.

versive Activities Control Board and the court of appeals subsequent to this Court's remand. "Tr." will be used, when necessary, to refer to the original typewritten transcript of the proceedings and evidence before the Board.

² The original Report as it appears at R. 1-137 is the unannotated version, published as Sen. Doc. No. 41, 83d Cong., 1st Sess. At R. 1803-2051 it appears in annotated form, i.e., with record references to the supporting evidence. The annotated version was filed in the original proceedings in the court below as a special appendix to respondent's brief. Whenever we have occasion to refer to the Board's original Report, we shall refer to both versions in the manner indicated in the text, i.e., with the reference to the annotated version appearing in brackets immediately following the reference to the unannotated version.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1959 (R. 2708; Pet. App. B, p. 133), and a petition for rehearing was denied on August 27, 1959 (R. 2708, 2709). The petition for a writ of certiorari was filed on November 23, 1959, and granted on February 5, 1960 (361 U.S. 951; R. 2723). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 14(a) of the Subversive Activities Control Act of 1950.

QUESTIONS PRESENTED

1. Whether the Subversive Activities Control Act of 1950, as amended, is unconstitutional on its face or as applied in this case (Pet. Ques. 1).

2. Whether the order of the Subversive Activities Control Board rests upon a proper construction and application of the Act (Pet. Ques. 2).

3. Whether the order of the Board is supported by the preponderance of the evidence (Pet. Ques. 3).

4. Whether it was error to refuse to strike all of witness Budenz' testimony because it was not possible for the witness, due to illness, to be subjected to cross-examination with the use of his statements to the F.B.I. on the Sfarobin and Childs-Weiner matters (Pet. Ques. 4).

5. Whether, in the particular circumstances, petitioner was entitled to the production of statements by the Attorney General's witnesses relating to their direct testimony (Pet. Ques. 5).

6. Whether the court below, having sustained the ultimate finding of the Board as supported by other findings and by the preponderance of the evidence, erred in refusing to remand because a subsidiary finding of the Board lacked evidentiary support (Pet. Ques. 6).

STATUTES INVOLVED

The pertinent provisions of the Subversive Activities Control Act of 1950 (Title I of the Internal Security Act of [September 23,] 1950, c. 1024, 64 Stat. 987, 50 U.S.C. 781 *ff.*), as amended, the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 163, the Communist Control Act of [August 24,] 1954, c. 886, 68 Stat. 775, and the Social Security Amendment of [Act of August 1,] 1956, c. 836, 70 Stat. 824, 42 U.S.C. 410, are set forth in an appendix to petitioner's brief (Br. A-1 to A-48).

STATEMENT

A. The original proceeding before the Board.—On November 22, 1950, the Attorney General, pursuant to Section 13(a) of the Subversive Activities Control Act of 1950, filed with the respondent Subversive Activities Control Board a petition (R. 143-159) for an order requiring petitioner, the Communist Party of the United States, to register with him as a Communist-action organization in the manner required by Section 7(a), (c), and (d) of the Act. The petition alleged that the Party was a Communist-action organization as defined in the Act (Section 3(3)), and set forth numerous allegations of fact in support of the contention.

On February 14, 1951, petitioner filed "under protest" an answer denying generally that it was a Communist-action organization as defined in the Act (R. 160-161). The answer cited the Act that there was then pending in the United States District Court for the District of Columbia a suit to enjoin further proceedings before the Board (*ibid.*). Petitioner reserved the right to amend its answer in the event of an adjudication in the pending court proceeding that an answer was required (*ibid.*). On February 28, 1951, a statutory three-judge court, in the proceeding referred to, denied injunctive relief. *Communist Party of the United States v. McGrath*, 96 F. Supp. 47. On March 13, 1951, the district court issued an order staying answer and hearings before the Board to and including March 27, 1951, pending appeal (R. 1, fn. 1 [1804-1805]). On March 26, 1951, this Court denied a petition for an extension of this stay (*ibid.*; 340 U.S. 950). The suit was thereafter abandoned by petitioner (R. 1, fn. 1 [1804-1805]).

On April 3, 1951, petitioner filed an amended answer to the Attorney General's petition (R. 161-187), in which, *inter alia*, it admitted that it was

³ The court (Letts and Pine, D. JJ.) based its decision on the grounds that petitioner had not exhausted its administrative remedies and that "the public interest is paramount to any threatened loss or damage" to petitioner "pending final determination of the case" (96 F. Supp. at 47). Circuit Judge Bazelon, concurring in the result, based his position on his determination that the Act was not unconstitutional on its face and that no circumstances appeared to warrant the intervention of a court of equity at that stage (*id.*, pp. 47-53).

munist Control Act of 1954, except insofar as it amended the Subversive Activities Control Act, had no application to this proceeding (R. 2125). The dissenting judge, being of the view that the registration provisions of the Act were unconstitutional as violative of the Fifth Amendment's prohibition against compulsory self-incrimination (R. 2153-2166), did not consider any of petitioner's other contentions (R. 2166).

C. *The original proceeding in this Court.*—This Court granted certiorari on May 31, 1955 (349 U.S. 943). After argument, the Court, on April 30, 1956, held that the court of appeals erred in refusing to return the case to the Board for consideration of the new evidence proffered by petitioner's motion and affidavit (351 U.S. 115). The Court reasoned that the taint resulting from the uncontested allegations of petitioner that the Board's findings were based in part on perjurious testimony by Crouch, Johnson, and Matusow was not removed merely because there was ample innocent testimony to support the Board's findings. Therefore, the case was ordered remanded to the Board "to make certain that the Board bases its findings upon untainted evidence." 351 U.S. at 125. The Court suggested that this could be accomplished either by holding a hearing to ascertain the truth of petitioner's allegations and to strike any testimony found to be discredited from the record, or to assume the truth of petitioner's allegations and without further hearing to strike the testimony of the three witnesses from the record. "In either event, the Board

must then reconsider its original determination in the light of the record as freed from the challenge that now beclouds it." *Ibid.*

D. The proceeding before the Board on remand.—

On May 21, 1956, petitioner filed three motions with the Board. The first motion sought to reopen for additional evidence concerning events assertedly occurring since the earlier hearing. The second motion prayed the Board to strike the testimony of Attorney General's witnesses Gitlow, Budenz, Honig, and Scarletto as tainted or, alternatively, to hold a hearing on this issue. The third motion asked to reopen the proceeding for the introduction of evidence concerning Attorney General's witness Mrs. Markward, including evidence that she had lied in a Department of Defense security hearing concerning the Communist Party membership of Annie Lee Moss. The Board, on August 10, 1956, denied all three motions (R. 2171-2191).

On August 17, 1956, the Party moved in the court of appeals for leave to adduce additional evidence that would assertedly show that the Board's findings concerning petitioner were no longer true and that the testimony of Mrs. Markward was tainted with perjury. These motions were denied by the court of appeals except that the Board was given permission to entertain a motion as to the alleged perjury of Mrs. Markward in respect to Annie Lee Moss "if sufficient and appropriate showing is made to it * * *" (R. 2409). On November 16, 1956, petitioner moved the Board to hear evidence on charges that Mrs. Markward had committed perjury with regard to Annie

Lee Moss and, in addition, in a Smith Act prosecution (R. 2192-2206). On December 3, 1956, the Board granted the motion, in part, to allow petitioner to cross-examine Mrs. Markward in an effort to lay a basis for a broader investigation and hearing (R. 2206-2212). The hearing was reopened on December 11, 1956, with the full Board presiding and Mrs. Markward was cross-examined exhaustively (R. 2231-2253; Tr. 17081-17132).

On December 18, 1956, the Board issued its Modified Report (R. 2406-2651).⁵ The Board concluded on the basis of observing the cross-examination of Mrs. Markward that she had not committed perjury concerning Annie Lee Moss and was a creditable witness (R. 2409-2411). Furthermore, consistent with the opinion of this Court, the Board expunged the testimony of Attorney General's witnesses Crouch, Johnson, and Matusow, and then reassayed the original findings (R. 2411). On the basis of a thorough analysis, the Board concluded that, after expunction of the testimony of the above three witnesses, all major findings of its original Report remain supported and that no substantial gaps had been left in the evidence (R. 2411). In short, after reconsidering the record (excluding the testimony expunged), the Board concluded "that the evidence establishes be-

⁵ The Modified Report is described in greater detail below, pp. 212-221.

yond doubt that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union * * * and operates primarily to advance the objectives of such world movement" (R. 2644). The Board therefore recommended that the court of appeals affirm the Board's order requiring registration (R. 2644-2645).

E. The second proceeding before the court of appeals.—On review of the Board's Modified Report, the court of appeals, on January 9, 1958, remanded for production to petitioner of certain reports made to the F.B.I. by witness Markward but affirmed the actions of the Board on all other points (254 F. 2d 314; R. 2652-2680). After the 'court of appeals' opinion of January 9, 1958, government counsel discovered, in the files of the F.B.I., mechanical recordings of an interview of the Attorney General's witness Budenz with the F.B.I., which had been recorded without Budenz' knowledge, and whose existence had not previously been known to counsel or to the Board (R. 2685-2687). The Board reported this discovery to the court, by an affidavit of counsel. The court by an order of April 11, 1958 (R. 2693-2695), construed by an order of June 16, 1958 (R. 2695-2696), enlarged the scope of the remand order to the Board to include the production of all "statements"—as defined by 18 U.S.C. 3500—of Budenz to the F.B.I. relating to the "Starobin letter" and the "Childs-Weiner conversation."

F. The proceeding before the Board on second remand.—On this remand, the reports covered by the orders of the court of appeals were made available to petitioner. The hearing before the Board was reopened before a member of the Board sitting as an examiner. The examiner, on September 19, 1958, granted in part and denied in part petitioner's motion to strike the testimony of Budenz, reevaluated the credibility of witnesses Markward and Budenz, reexamined the evidence, and recommended that certain modifications be made in the Modified Report and that the Board affirm its determination that petitioner is a Communist-action organization as defined in the Act (R. 2297-2328). After exceptions to this recommendation were filed and argued, the Board examined the record and itself reevaluated the credibility of witnesses Markward (R. 2377-2387) and Budenz (R. 2387-2400) and considered other points raised by petitioner (R. 2400-2402).

On February 9, 1959, the Board issued its Modified Report on Second Remand (R. 2375-2402), reaffirming the findings and conclusions in its Modified Report of December 18, 1956, with certain modifications, and again recommending that the court of appeals affirm the Board's order requiring petitioner to register as a Communist-action organization (R. 2402).

G. The third proceeding before the court of appeals.—On July 30, 1959, the court of appeals affirmed the Board's order (R. 2700-2707). The court held that the findings in the Modified Report on Second

Remand were fully supported by the original evidence as reduced by the expunction of parts of it and by the holdings of the Board finding certain other testimony uncreditable.

SUMMARY OF ARGUMENT

I

Consideration of the problems which led to the enactment of the Subversive Activities Control Act will tend to show the reasonableness of the Act particularly as applied to petitioner, and thus to refute the contention that it arbitrarily invades basic constitutional liberties.

By 1939, Congress had before it a mass of evidence, collected over the previous nine years, pointing to the conclusion that the Communist International and the Communist Party of the United States were dedicated to the establishment of a proletarian dictatorship by force and violence in this country and throughout the world, and that the American Communist Party was completely controlled both as to policy and leadership by the Soviet Union through the Communist International. The weapons adopted by Congress to combat this evil included the Smith Act of 1940, punishing advocacy of or conspiracy to advocate the overthrow of this Government by force and violence (sustained as against eleven leaders of petitioner in *Dennis v. United States*, 341 U.S. 494), the Foreign Agent Registration Act of 1938 (considered in *Viereck v. United States*, 318 U.S. 236), and the 1940 Voorhis Act. The two latter Acts were aimed at the dissemination

in this country of unidentified foreign propaganda, the remedy adopted being compulsory identification and disclosure.

For various reasons these Acts could not be effectively enforced against organizations, such as petitioner, which threw a "smoke screen" around their operations and obscured the sources and nature of their foreign control. For example, petitioner, at its 1940 national convention, adopted a resolution "dissolving" its affiliation with the Communist International "for the specific purpose of removing itself from the terms of the so-called Voorhis Act." In addition, the Voorhis Act provided no adequate administrative machinery to search out the true facts regarding control by foreign dictatorships and the real objectives of domestic organizations which were believed to be subversive but which veiled their true ends behind a facade of respectability. The Act was addressed only to the formal, overt aspects of a particular group, and failed to reach the true but secret purposes which lay beneath the surface and which constituted a real threat to the security of the United States.

The post-World War II revelations of widespread espionage and infiltration of sensitive government agencies in Canada, England, and the United States by Soviet agents, recruited from the membership of the domestic Communist parties in those countries, showed more clearly the nature and dimensions of the danger. In addition, the evidence adduced at the trial and conviction in 1949 of the eleven leaders of

the American Communist Party under the Smith Act, and the commencement of hostilities in Korea in June 1950, furnished Congress with further reason to believe, in September 1950, when the Act in issue was passed, that the dissolution of the Communist International in 1943 had been merely a subterfuge and that there remained in existence a world Communist movement which endangered the security of the United States.

II

The Subversive Activities Control Act is constitutional on its face and as applied to petitioner. While we believe that the Act is constitutional as a whole, the Court would be justified in declining to pass upon the sanctions until they actually come into play. Since the registration provisions have a purpose of their own, the Act's separability clause makes it clear that they would stand even if one or more of the sanctions were held invalid. It would therefore be consistent with the Court's long-standing policy to avoid the premature decision of constitutional issues—and more specifically “to delay passing upon the constitutionality of all the separate phases of a comprehensive statute * * * in advance of efforts to apply the separate provisions” (*Watson v. Buck*, 313 U.S. 387, 402)—for the Court to consider only the registration provisions at this time. In any event, we submit that all of the challenged provisions are valid.

A. *The hearing and registration provisions.*—1. The First Amendment does not prohibit Congress from requiring registration of, and disclosure of information by, domestic organizations dominated by foreign agencies whose purpose it is to establish a Communist dictatorship in this country. The freedoms guaranteed by the First Amendment are not absolute: Even direct limitations on those freedoms may be permissible where clearly necessary to the effectuation by Congress of an end within its power to bring about. *A fortiori*, those freedoms may be indirectly restrained in proper circumstances.

This Court has many times sustained statutes which placed indirect restraints on freedom of speech or of the press, where the statute's objective lay within the power of Congress or a state to bring about, and the restraint was a necessary and appropriate concomitant of the exercise of the power. Examples are the Hatch Act (*United Public Workers v. Mitchell*, 330 U.S. 75), the Federal Regulation of Lobbying Act (*United States v. Harriss*, 347 U.S. 612), the Federal Corrupt Practices Act (*Burroughs v. United States*, 290 U.S. 534), the non-Communist affidavit clause of the amended National Labor Relations Act (*American Communications Assn. v. Douds*, 339 U.S. 382), the ownership-disclosure requirements of the postal laws (*Lewis Publishing Co. v. Morgan*, 229 U.S. 288), and a state statute regulating associations having oath-bound memberships (*Bryant v. Zimmerman*, 278 U.S. 63). The Foreign Agents Registration Act (see *Viereck v. United States*, 318 U.S. 236, particularly

the dissenting opinion of Mr. Justice Black, with whom Mr. Justice Douglas concurred, 318 U.S. at 251) is another illustration of a statute of this type.

The various evils at which the statutes thus sustained were aimed, grave as they were, are dwarfed in comparison to the evil at which the Act at bar strikes—the threatened destruction, through force, violence, and deceit, of our constitutional form of government and the subjection of the nation to the domination and control of a foreign dictatorship. Indeed, this Court has repeatedly recognized the great seriousness of the evil and, because of its conspiratorial nature and avowal of illegal means, has refused to treat the Communist Party as an ordinary political party. *E.g., Galvan v. Press*, 347 U.S. 522; *Barenblatt v. United States*, 360 U.S. 109. In the light of that evil, the registration requirements do not invalidly restrict free speech, press, or association. The rationale underlying this Court's decisions sustaining "disclosure" statutes is that it is in the interest of both free speech and free association that Congress and the public be adequately and correctly informed, at least where the dangers stemming from non-disclosure are serious. The device of registration and disclosure is therefore a reasonable measure to be applied to the Communist Party, now that it has been found, after full hearing, to be directed and controlled by the Soviet Union and to be operating primarily to advance the objectives of the world Communist movement.

Petitioner's reliance on various criminal cases, and especially *Yates v. United States*, 354 U.S. 298, is mis-

placed. First, the registration provisions of the Act impose no criminal punishment for any action, let alone speech or advocacy, except failure to register. Thus, this Act imposes a far less serious restraint than the statutes involved in the other cases. Second, registration is not on the basis of speech; whatever restraint may exist on speech is an indirect result of registration based on other activities. Lastly, unlike its course in the area of criminal legislation like the conspiracy provisions of the Smith Act, this Court, has never applied the clear and present danger standard to disclosure and registration requirements. But even if this standard were applied, both Congress and the court of appeals have found—on the basis of evidence which is clearly sufficient—that a clear and present danger exists.

2. Neither the registration provisions of the Act nor the Board's order violates the Fifth Amendment's prohibition against compulsory self-incrimination.

(a) The present case is not a proper vehicle for the litigation of the self-incrimination issues. Even if the officers who will eventually have the duty to effect the registration of petitioner will be personally privileged to decline to do so, that fact does not render the registration provisions of the Act invalid. At the present time, the self-incrimination issue is entirely hypothetical since no officers have as yet been called upon to register.

(i) The privilege applies only to natural individuals (*United States v. White*, 322 U.S. 694, 698), of whom there is none before the Court at this time. The present case is therefore not a proper vehicle for the litigation of self-incrimination issues.

(ii) The privilege must be personally and explicitly claimed. There has been no claim of privilege thus far, and there may never be one. Since this Court does not anticipate constitutional issues, petitioner's attempt to litigate the self-incrimination issue in this case, before it is raised, is premature. The officers of petitioner who will have the duty to effect its registration when the registration order becomes final will be able to claim their privilege on the registration form required to be filed with the Attorney General. The question of the validity of the claim, if its validity is disputed, can then be litigated. See *United States v. Sullivan*, 274 U.S. 259.

(iii) There are several reasons, moreover, why it cannot justifiably be assumed at this time that a substantial claim of privilege will inevitably be made and be required to be honored when petitioner is confronted by the statutory requirement that it register, after the order becomes final.

First, in seeking an injunction before the original Board hearing, petitioner stated that its officers would not appear because of fear of self-incrimination. Yet two of petitioner's important officers, one of whom, among others, might be responsible for registration under the Act, did appear and testify at length. This testimony may in fact constitute the waiver of their privilege.

Second, the top officials of petitioner, who are the ones who will have the duty of filing the registration statement, have never attempted to conceal their membership and places of leadership in petitioner. A

claim of privilege on their part would be on a different footing from a similar claim by a person not publicly and indisputably known as a Communist Party member. The privilege presupposes a real danger of legal detriment arising from disclosure. *Rogers v. United States*, 340 U.S. 367. Relevant to the issue of the *bona fides* of a claim of privilege against self-incrimination would be the fact that under the Act neither the holding of office nor membership in a Communist organization shall constitute *per se* a violation of any criminal statute, and the further fact that the registration of any person under the Act as an officer or member may not be received in evidence against him in any prosecution for an alleged violation of any criminal statute. Whatever the merits of these hypothetical questions, their determination should await their being maturely raised.

(iv) Even assuming, moreover, that a claim of privilege will be made and that, when made, it will be required to be honored, this would make the order to register at most unenforceable, not void. Congress could remove the barrier to non-enforceability by a grant of immunity; and in any event non-enforceability would not affect the "sanctions" which come into effect when an order to register becomes final. Furthermore, an important public function is served by the Board's finding that petitioner is a Communist-action organization and should register, regardless of whether the registration can actually be effected; Congress desired to have the facts sifted and established by quasi-judicial proceedings, and then made known to the public.

(b) If the Court should reject our argument that it should not now pass on the issue of whether an officer of petitioner can validly claim the privilege as a ground for not registering petitioner, and should desire to determine that issue in this proceeding, our position is that the privilege is not available to such officers, under the holding of *United States v. White*, 322 U.S. 694—that an officer of an organization who has custody of its records, if called upon to produce them pursuant to a subpoena, may not lawfully refuse even if they would tend to incriminate him personally. The rationale of this decision is not inapplicable on the ground that in that case physical records were in question, while the issue here is the compulsory submission of a registration statement containing the names and addresses of officers and members of petitioner and an accounting of moneys received and expended. The data required to be contained in the registration statement are reproductions of or extracts from organization records. If the officer can be compelled to produce the physical records, he can be compelled to translate their pertinent data to a registration form. Any valid privilege as to personal information can be claimed on the registration form. See *United States v. Sullivan*, 274 U.S. 259.

(c) The validity of the personal registration requirements of Section 8 is not in issue since no individual member of petitioner has been required to register and none is before the Court.

3. The registration provisions are in accord with due process.

(a) The Act does not predetermine petitioner's liability to registration so as to render the proceedings before the Board a formality; nor does it contain any "built-in" finding against petitioner. Petitioner's contrary argument ignores the crucial language in the Section 3(3) definition of a "Communist-action" organization. Under that definition, a domestic organization which is not substantially controlled by the foreign government or group controlling the world Communist movement, or which does not operate primarily to advance the objectives of that movement, is not a Communist-action organization and is not subject to the registration and other provisions of the Act, regardless of how "communistic" its philosophy might be, or how deep might be its bonds of sympathy and kinship with the foreign government or organization. The important point is that Congress required proof, which it made subject to judicial review, of the two fundamental operative facts (referred to above) by a preponderance of the evidence in proceedings before the Board—before the obligation to register or any other requirement of the Act could become effective.

Due process does not require that the congressional findings in Section 2 as to the existence of a world or an American Communist movement be the subject of redetermination before the Board. These are general *legislative* findings supporting the Act as a whole and not *adjudicative* facts forming the basis for an order against an individual organization. This Court has specifically recognized the validity of such legislative

findings. *Galvan v. Press*, 347 U.S. 522; *Carlson v. Landon*, 342 U.S. 524.

While the Communist Control Act of 1954 refers to petitioner by name, it was passed after petitioner was originally found to be a Communist-action organization. And in reaffirming the earlier determination in the Modified Report, the Board relied entirely on judicially reviewable evidence and did not even consider the characterization of petitioner in the Communist Control Act.

(b) The Act does not establish a Board which is "necessarily biased" against petitioner. Petitioner's contention to the contrary in effect charges that the structure and scheme of the Act are such that it would be impossible to staff the Board with members who would not enter upon their duties with the intention of violating their oaths of office. But courts should not assume in advance that an administrative hearing may not be fairly conducted, particularly where, as here, full opportunity for judicial review is afforded by the Act. *Fahey v. Mallonee*, 332 U.S. 245.

(c) The Act does not authorize a determination that an organization is a Communist-action organization on the basis of irrational or vague criteria or presumptions. The Act establishes no "tests" as to whether an organization is a Communist-action group other than that established by the definition of such an organization in Section 3(3) (see *supra*, p. 24), which petitioner originally conceded to be "definite and meaningful." While petitioner now attacks the "ob-

jectives" requirement of Section 3(3), the objectives which must be shown are fully set forth in Section 2(1). This Court has allowed Congress great latitude in delegating power to administrative agencies on the basis of standards more general than that involved here. At the least, the standard here was "sufficiently precise for an intelligent determination of the ultimate questions of fact by experts" (*Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 400).

The eight factors itemized in Section 13(e) are merely evidentiary considerations which the Act directs the Board to take into account in determining whether an organization meets the Section 3(3) definition. When these considerations are thus correctly understood they are all rational and probative with respect to the decisive issue presented by the definition. And the fact that Congress directed the Board to "take into consideration" "the extent to which" the Section 13(e) factors are true or applicable does not render vague the ultimate standard of Section 3(3). This Court has frequently upheld lists of relevant evidence which Congress has directed administrative agencies to consider in making their determinations. *Opp Cotton Mills v. Administrator*, 312 U.S. 126; *Bowles v. Willingham*, 321 U.S. 503.

(d) Petitioner's claim that the Board's determination that a particular organization is a Communist-action group cannot constitutionally be conclusive in a criminal trial for failure to register is clearly premature since the case has not even reached the stage of preparing and filing the registration statement. But

even if the issue were not premature and even if petitioner were correct, this would merely mean that criminal defendants would have the opportunity to relitigate the Board's determination at that time.

In any event, the contention is without substance. The Board's order can be challenged in the manner Congress has provided—that is, applying for review in the court of appeals and ultimately in this Court. A defendant in a criminal trial would, in effect, be charged with failure to obey an administrative order (the Board's final order) since Congress has prescribed that certain consequences follow automatically from this order. The only issues for trial, therefore, would be whether there was a final order and whether the defendant has failed to obey. The Board's order need not be relitigated *de novo* any more than a draft classification can be retried in prosecutions for draft evasion (*Cox v. United States*, 332 U.S. 442), or a determination of the National Labor Relations Board can be relitigated in a contempt proceeding arising out of an enforcement order. Otherwise, if all enforcement of the administrative determinations were to be determined by the courts *de novo*, effective regulatory power would be transferred from the administrative agencies to the courts.

(e) The Communist Control Act of 1954 does not make it impossible for petitioner to know who its members are. Section 5 of that Act does not establish rigid "criteria" for determining membership in petitioner any more than Section 13(e) of the Act at bar establishes definitive "tests" for determining

whether an organization is a Communist-action group. The purpose of Section 5 is merely to list items of evidence to be considered in reaching the ultimate factual conclusion of knowing membership. Petitioner's attempt to depict Section 5 as a trap for the unwary disregards the nature of the listed items as nonexclusive evidentiary factors and ignores the further provision of Section 5 that the determination by "the jury" of the issue of knowing membership shall be "under instructions from the court." Moreover, the language of Section 5 shows that it has no application to, or connection with, petitioner's duty under this Act to file a registration statement listing its members, or to possible criminal proceedings against it or its officers for wilfully omitting the names of any members in such a statement.

(f) The validity of the provision making each day of failure to register a separate offense is not presented in this proceeding, since the penalty may never be applied to petitioner. In any event, the provision is valid. There can be no "astronomical" accumulation of penalties unless an organization which has been finally ordered to register chooses to incur them by continued deliberate noncompliance with a Board order which has been judicially sustained. It is settled that the extent of the permissible punishment imposable under an otherwise valid statute is a matter of exclusive legislative discretion.

B. The sanction provisions.—Immediately upon the registration of an organization under the Act, or when an order of the Board requiring an organization to register becomes final (after judicial review), certain

"sanctions," or legal disabilities; automatically occur.

1. Petitioner contends that the sanctions which result from a registration order make the Act an attempt to "outlaw" petitioner and therefore violate the freedoms protected by the First Amendment. If the validity of these sanctions is now properly before the Court, our position is that they are reasonable and valid, considered in the light of the evil at which the Act strikes.

(a) *Sanctions applicable to organizations as such.*—

(i) When an organization is registered or has been finally ordered to register, it must label its mailed literature and identify its broadcasts as emanating from a "Communist organization." Such labeling imposes no censorship on any mailed matter or broadcast material; the content of either is immaterial. What the provisions do is, not to censor the "speech," but to identify the "speaker." If such revelation interferes with the purposes of an organization by destroying its anonymity and disclosing its true nature, it is because of the unpopularity of the organization in the free market of ideas.

The decisions of this Court teach that such disclosure and labeling requirements may be validly imposed in order to serve a proper purpose (see *supra*, pp. 18-19). The petitioner in this case is the Communist Party, which has been found, after a full hearing (including judicial review), to be the puppet of a foreign power, working to achieve the ends of that power. It is, thus, not just another political party. Among its other activities, it engages in widespread

propaganda on behalf of its ultimate objective of domination by the world Communist movement and the Soviet Union. Much of its propaganda is covert, and all of it attempts to sell the Party to the public as peaceful and lawfully inspired. Theoretically, if everyone had the time and talent to be able to make an independent evaluation of the truth or soundness of each political utterance with which he is propagandized, he would have no need to know from what source the propaganda came. But as a practical matter this independent determination is in most cases impossible, and in making judgments we are continually influenced by the source from which statements emanate. Nowhere is the need for disclosure of the true source of propaganda more pressing than in the case of a Communist-action organization. Such identification does not limit freedom of expression, but adds to the relevant facts in the market-place of competing ideas. In the light of the allegiance of American Communists to a foreign power and their ultimate goal, the extensive degree to which they use the technique of concealment, and the success that they have had in influencing public opinion by this technique, the requirement that the Communist Party identify its propaganda as emanating from a "Communist organization" is justified. When an agency of the world Communist movement poses for tactical purposes as a benign domestic organization and champion of constitutional liberties, while concealing its ultimate strategy of foisting a communistic dictatorship on the nation in a Czechoslovakia-type coup—as soon as its

ranks have been sufficiently strengthened by the victims of its propaganda—Congress can act to defeat the strategy by compelling the truthful identification of the source of the propaganda.

(ii) The Act's disallowance of deductions for tax purposes of contributions to any organization which has been finally ordered to register as a Communist organization and its denial to such an organization of tax-exemption under the Internal Revenue Code are reasonable and valid withdrawals by Congress of its legislative grace for proper reasons of policy.

(iii) The Act makes it unlawful for officers and employees of the United States and of defense facilities to contribute funds or services to organizations which have been finally ordered to register. Assuming that the effect of this prohibition on petitioner is not so remote, despite the indirectness of its impact, as to deprive it of standing to challenge it, this provision is a reasonable and valid measure in relation to the evil at which the Act is aimed. If Congress can validly forbid employees of the United States to engage in partisan politics (*United Public Workers v. Mitchell*, 330 U.S. 75), and if the Government has the power to safeguard itself by appropriate security and loyalty investigations of its employees, Congress can validly forbid them to contribute to the welfare of an organization having as a primary objective the destruction of their employer at the earliest feasible opportunity.

Similarly, if Congress can validly provide that members of a Communist-action organization shall be ineligible for defense-facility employment (see *infra*), it can also forbid the employees of such facilities to support such an organization with money contributions.

(b) *Sanctions applicable to individual members of organizations ordered to register.*—(i) The members of an organization finally ordered to register are barred from government and defense-facility employment, and from holding office in, or employment with, any labor organization or as employer-representatives in proceedings under the National Labor Relations Act.

The reasonableness and validity of the prohibition against government employment is clear. The prohibition applies only to those members who continue to remain such with knowledge or notice that the organization to which they belong either has voluntarily registered under the Act or has been finally ordered to do so.

The prohibition against defense-facility employment is on a par with that relating to government employment. The manifest purpose of the prohibition is to guard against sabotage and espionage in establishments vital to the national defense. Congress is not limited, in guarding the nation against these dangers, to exacting criminal penalties after they occur. It can adopt reasonable measures to prevent their occurring. We must assume that the Secretary of

Defense, under the power granted him by Section 5(b), will designate as "defense facilities" establishments that are vital to the national security. The Secretary's discretion is not "unfettered"; if it were abused, this would doubtless be a defense in a criminal prosecution or could be challenged in some other judicial proceeding.

The prohibition against holding office in, or employment by, labor organizations is a logical corollary of *American Communications Assn. v. Douds*, 339 U.S. 382, where the Court sustained the validity of the non-Communist affidavit provision of the amended National Labor Relations Act. If a union officer who cannot subscribe to a non-Communist affidavit can be forced out of his position of leadership in the union by the indirect method of depriving his union of rights it would otherwise enjoy before the Labor Board, there can be no infirmity in directly prohibiting him from being on a labor union staff as an officer or employee, so long as he retains his Communist ties. The prohibition against employer-representation is on the same footing, for management representatives, from their places on the other side of the bargaining table, can use their positions for political ends to the same extent as union officials.

(ii) Equally valid is the prohibition against the use of passports by members of organizations which have been finally ordered to register. The Government may decline to confer its diplomatic protection upon

members of an organization found to be dedicated to its overthrow by force. The passport sanction is also valid insofar as it prevents travel abroad by members of such an organization. The unity and cohesive force of the world Communist movement are promoted through personal contacts of its members both here and abroad. Congress has the power to seek to prevent such contacts in the manner encompassed by this provision.

(iii) Alien members of Communist-action organizations which by a final order have been directed to register are excludable and deportable from the United States, and are ineligible for naturalized citizenship. Petitioner has expressly conceded the validity of the exclusion and deportation sanctions. And there can be no doubt of the constitutionality of the naturalization sanction in view of the plenary power of Congress to impose conditions upon the conferring of citizenship by naturalization. The Act also provides that membership (within five years after naturalization) in a Communist-action organization shall, with respect to persons who obtain naturalization in the future, constitute a rebuttable presumption, in denaturalization proceedings, of lack of attachment to the principles of the Constitution at the time of naturalization. Since there is no question of retroactivity, or of the Government's revoking a grant of citizenship on grounds which the naturalized person could have had no reason to anticipate when he received it, this provision is likewise valid.

2. The member-sanctions do not deprive petitioner's members of due process, since they do not rest on innocent or unknowing memberships and associations of the past. They apply only to members who continue their membership after an organization registers or is finally ordered to register. *Wieman v. Updegraff*, 344 U.S. 183, is therefore inapplicable. Nor is there merit in petitioner's contention that, after an organization has registered as a Communist-action group, thereby admitting its character as defined in Section 3(3), or after it has been formally found to be such an organization by a Board finding which has been judicially reviewed and sustained, each member must be afforded an opportunity personally to rebut the characterization before any member-sanction can apply to him on account of his continued membership. The organization clearly represents its members in any proceedings as to the character of the organization.

3. The sanction provisions do not make of the Act a bill of attainder. For a legislative act to constitute a bill of attainder, it is necessary that there be *punishment* and that the conduct punished be *past* conduct. Whether a statute inflicts punishment depends on the intent of Congress, and it is clear that this Act was intended to check the world-wide Communist danger insofar as it was working through organizations in the United States and not to punish the members of these organizations. Furthermore, regardless whether the sanctions be deemed of a penal nature or not, the Act does not punish *past* conduct.

The "members" on whom the sanctions are imposed are not past or former members. *Bona fide* termination of membership by any person who is a member up to the time of registration or the time when an order to register becomes final precludes the sanctions' taking effect as to him.

III

The court below correctly sustained the Board's factual findings that petitioner is a Communist-action organization as defined in the Act.

A. There is no occasion for a second judicial review of the Board's factual finding that petitioner is a Communist-action organization. A unanimous Board found, on the basis of the "overwhelming weight of the evidence," that petitioner is a Communist-action organization. It presented the grounds of this finding, and the subsidiary findings on which it rests, in an exhaustive report. After remand by this Court, the Board expunged from the record the testimony of questioned witnesses, but found after a thorough reconsideration of the remaining evidence "that the evidence establishes beyond doubt" that petitioner is a Communist-action organization. On a new remand by the court of appeals, the Board struck certain other evidence and re-evaluated the entire record. Again, the Board found that the evidence established "by a preponderance of the evidence that petitioner is a Communist-action organization." The court below, in discharge of its statutory obligation, determined that the Board's original conclusion was "supported

by the preponderance of the evidence" after a painstaking review of the entire record. In its two subsequent determinations, the court re-evaluated the evidence and affirmed the Board's findings, stating in its last opinion that the "findings are amply supported" and that "[t]he preponderance of all the evidence supports the conclusion of the Board."

In these circumstances, there is no occasion for this Court to subject the lengthy transcript to a second—indeed, a fourth—judicial review for the purpose of reappraising and re-evaluating the evidence. Since Congress charged the courts of appeals with primary responsibility for ascertaining that the findings of the Board are sufficiently supported, the Court need do no more than satisfy itself that the court below made a fair assessment of the record on the issue of sufficiency of the evidence. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498; *National Labor Relations Board v. American Insurance Co.*, 343 U.S. 295. That the court below did so is evident from its opinion.

B. Petitioner makes no attempt to assay the significance of any of the proof it attacks from the standpoint of the sufficiency of the evidence as a whole. Its attack is concentrated on minutiae of the evidence, frequently lifted out of context. This fragmentary approach overlooks the fact that all relevant facts are cumulative in delineating a completed whole, and that an unmistakable picture can emerge from numerous fragments having little individual significance.

Viewed from the standpoint of the record as a whole, petitioner's criticisms are but pin pricks at the evidence, often relating to matters having obviously minor bearing on the ultimate issue. And the fallacy of petitioner's method is shown by the fact that, by hacking away at the individual trees and ignoring the forest, petitioner has reached the astonishing conclusion that it is rationally impossible to conclude that the Communist Party of the United States is the pawn of the Soviet Union and exists to further the objectives of the world Communist movement.

1. The Board and the court below correctly construed and applied the evidentiary considerations enumerated in Section 13(e) of the Act. The Board's finding, *inter alia*, that petitioner's original policies were carried out according to directions from the leaders of the world Communist movement, and that petitioner is still pursuing the policies of the Soviet Union and world Communist movement, fully met the requirements of the "directives and policies" consideration.

As for the "non-deviation" consideration, the point is not that petitioner's views on every issue were false or unreasonable. The point is rather that the fact that a domestic organization, throughout its thirty years' history, has faithfully and without deviation mirrored the views of a foreign power on every significant aspect of world politics is surely evidence, to be weighed in the balance with all the other evidence, that the foreign power controls the domestic organization and dictates its policies.

The contention that the Board and the court below misconstrued and misapplied the "discipline" consideration is in reality nothing more than an attack on the sufficiency of the evidence supporting the Board's finding on this point. It illustrates petitioner's mistaken insistence, met with throughout its discussion of the evidence, that the evidence under each of the Section 13(e) categories be considered *in vacuo*, unconnected with and unilluminated by any of the other evidence of record.

The argument that the Board misapplied the "allegiance" consideration is based largely on petitioner's mistaken assumption that the Board's finding that petitioner advocates the violent overthrow of the United States Government was based primarily on the Marxist-Leninist writings considered by this Court in *Schneiderman v. United States*, 329 U.S. 118. In fact, the Board's force-and-violence finding was based upon the testimony of former members of petitioner, as well as upon authoritative writings not in evidence in the *Schneiderman* case.

2. The Board and the court below also correctly construed and applied the statutory requirements for a Communist-action organization in Section 3(3) of the Act. The language of the Act demonstrates that substantial direction, domination, or control by a foreign power does not mean the physical power to enforce compliance. Nor could Congress have intended such a strict standard since such physical power over an organization physically situated in the United States would,

be almost impossible as long as the United States is a sovereign nation. Thus, both the Act itself and its purpose demonstrate that complete voluntary compliance is enough. The evidence not only shows such compliance but shows that the world Communist movement holds considerable coercive power over petitioner by the threat of expulsion of petitioner from the movement. And the evidence also shows that petitioner is totally dedicated to achieving the objectives of the world Communist movement, i.e., Communist totalitarian dictatorship in the United States and throughout the world.

3. The Board's finding that petitioner is a Communist-action organization is based upon proof as to its current practices and activities as illuminated by its past history. The Board did not, as petitioner contends, rest its decision upon evidence of conduct discontinued before enactment of the Act. Petitioner's own witnesses testified that petitioner was the same sort of organization at the time of their testifying as it had always been. Petitioner's whole position in this case has been that it has not been, at least since 1940, an organization of the type the Act defines. The Government's evidence overwhelmingly established the contrary—that prior to 1940, petitioner was a mere section of the world Communist movement; that disaffiliation from the Communist International in 1940 was merely to avoid a federal statute and did not change petitioner's actual role in the world Communist movement; and that, since 1941, petitioner has continued as a Communist-action organization.

4. The Board's conclusion that there exists a world Communist movement having the characteristics described in Section 2 of the Act was not necessary to the validity of its order. Congress found, as a legislative fact in Section 2, that such a movement exists and Section 3(3), which defines a "Communist-action organization," requires no further finding by the Board. In any event, the Board's finding was supported by the preponderance of the evidence.

C. The action of the court below in striking one of the subsidiary findings of the Board did not require that the case be remanded to the Board for redetermination, particularly since the Board did not rely on or even mention this finding in making its ultimate determination. The court found that the Board's ultimate and decisive finding—that petitioner is a Communist-action organization as defined in the Act—was supported by the preponderance of the evidence. Under the circumstances, remand would have served no useful purpose. The court therefore correctly affirmed the Board's order. *National Labor Relations Board v. Newport News Co.*, 308 U.S. 241.

IV

Petitioner's claims relating to the production of statements given to the F.B.I. by witnesses of the Attorney General were abandoned in this Court when the case was first here. Petitioner cannot resurrect these claims after the remand. In any event, they have no merit.

A. At the hearing, petitioner moved for the production of statements made by the Attorney General's witness Budenz to the F.B.I. on the Starobin and Childs-Weiner matters. The Board denied the motion. But

after the *Jencks* decision, 353 U.S. 657, these statements were ordered produced. Since Budenz was at this time too sick for cross-examination to be reopened, the Board ordered Budenz' testimony on these two matters stricken.

Petitioner contends that all of Budenz' testimony should have been stricken. But the interference in petitioner's cross-examination on the two specific matters was not the "fault" of the Government since it was merely following substantial legal authority prior to *Jencks*. Moreover, petitioner suffered no material loss. First, a comparison of Budenz' statements shows no more than the usual discrepancies when a long and detailed story is told at widely separated intervals of time. Second, the Starobin and Childs-Weiner matters were separable from the other testimony on which petitioner had impeached Budenz as much as it could by extensive cross-examination. Third, there is considerable evidence that Budenz' other testimony was at least substantially correct. And last, but perhaps most important, petitioner made no effort to produce witnesses who were readily available to rebut either Budenz' testimony on these two matters or on his other testimony which also gave specific names, dates, and places. In these circumstances, the Board was perhaps not even required to strike Budenz' testimony on the Starobin and Childs-Weiner matters. But certainly it was acting within its proper broad discretion as an expert trier of fact in refusing to strike Budenz' entire testimony on the faint possibility that further cross-examination on the Starobin and Childs-Weiner matters might show actual perjury discrediting the other testimony as well.

B. Petitioner was not entitled to production of the

memoranda prepared by the Attorney General's witness Gitlow. The motion for production asked for all documents and memoranda Gitlow had given the F.B.I. Thus, it extended far beyond the documents which are producible either under the *Jencks* decision or statute. *Jencks* made clear that its holding requiring production of relevant documents made or approved by the witness did not extend to a "broad or blind *fishing expedition* among documents possessed by the Government on the chance that something impeaching might turn up." 353 U.S. at 667.

But even if the Board's denial of production were error, it was certainly harmless. All of the Gitlow memoranda related to the period before 1929. Undisputed documents establish that petitioner was a section of, and controlled by, the Communist International during this period. Petitioner virtually concedes this fact and concentrates almost its entire argument on claiming that its disaffiliation from the International in 1940 ended control by the Soviet Union and the world Communist movement. Thus, it is as clear as human prognostication can be that impeaching the credibility of Gitlow could not possibly change the Board's ultimate determination.

C. Petitioner's motions for the production of documents made for the first time after the remand by this Court came six years after the Board finished hearing testimony. These motions are therefore obviously out of time. And neither the Board nor the Government misled petitioner into failing to request production at the proper time.

ARGUMENT *

Once again, petitioner levels a broad-scale attack against almost every provision and facet of the Subversive Activities Control Act, as if the Court were called upon at this time to pass upon the whole Act and its entire application. But the truth is, of course, that the Act is multi-faceted and only some of its aspects are now ripe for adjudication. Three types of organizations—"Communist-action," "Communist-front," and "Communist-infiltrated"—are dealt with in the Act. As to these organizations, there are three general classes of provisions—housing and registration requirements, non-criminal sanctions, and criminal penalties. There are also comparable classes of provisions as to certain categories of individuals. In this case at this time, we have only one organization and only one of the three types—the Communist Party of the United States, found to be a Communist-action organization; no other class of organization and no individuals at all are before the Court. Moreover, we are dealing with the Communist Party only at the stage when it is availing itself of its statutory right to contest in the courts the Board's finding that it is a Communist-action organization and the Board's order that it register as such.

* Since many of the issues involved here are identical with those raised when this case was originally before this Court (No. 48, Oct. Term, 1955), we have repeated substantial portions of the earlier brief submitted by respondent to the Court. Thus, this brief is a self-contained and complete description of respondent's present position before the Court, and reference need not be made to the brief filed at the 1955 Term.

These facts mold the frame in which the Court will view the case and in which we must present it. But before focussing directly on the various levels of controversy, we think that it will be helpful to sketch the historical background of the Act, and also to give a somewhat detailed analysis of the Act's provisions (although only part of these provisions are directly pertinent to this case).

I

INTRODUCTION: THE BACKGROUND AND PROVISIONS OF THE SUBVERSIVE ACTIVITIES CONTROL ACT

A. THE HISTORICAL BACKGROUND OF THE ACT

We give a brief review of the Act's historical setting in the hope that it will assist the Court in its task of weighing the merits of petitioner's arguments. Just as an examination of the problem or evil which evoked the passage of legislation is a sound guide to its purposes and meaning (*Holy Trinity Church v. United States*, 143 U.S. 457, 463-465; *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489-493), so too a fair appreciation of the nature of the problem which led to the enactment of a statute is indispensable to proper evaluation of the soundness of challenges to its constitutionality. Cf. *American Communications Assn. v. Douds*, 339 U.S. 382, 388-389; *Dennis v. United States*, 341 U.S. 494, 562-566 (Mr. Justice Jackson, concurring). Consideration of the problems which called the legislation involved here into being will tend to show, we believe, the reasonableness of the basic scheme of the Act, particularly as applied to the petitioner, and thus to refute the contention that

it arbitrarily invades basic constitutional liberties. Rarely has there been a more intense study of methods of dealing with a particular evil than that which preceded and produced the Subversive Activities Control Act of 1950.⁷

Following World War I, the powerful totalitarian political movements of Communism, National Socialism, and Fascism developed in Russia, Germany, and Italy. The success of the so-called Fifth-Column groups in Europe during the 1930's indicated the vulnerability of republican forms of government to conspiracies guided from outside the country involved, ready to seize total power by illegal means as soon as the time became propitious. See Loewenstein, *Legislative Control of Political Extremism in European Democracies* (1938), 38 Colum. L. Rev. 591-622, 775-774. By 1940 it was clear that these highly organized and disciplined totalitarian movements, financed and directed from abroad and promoted domestically by secret dedicated action-groups, involved much greater danger to the democracies than had earlier individual exponents of political violence. The danger became one, not of ideas and philosophies, but of external aggression aided by local Trojan-Horse groups serving the aggressive aims of their foreign principals.

As early as 1930, investigations were conducted by Congressional committees into Communist propaganda and activities in the United States and considerable testimony directed to this issue was adduced

⁷ There is a more detailed discussion of much of this material in the Government's brief in this Court in *Dennis v. United States*, Oct. Term, 1950, No. 336, pp. 174 *et seq.*

in various cities of the United States. See *Internal Security Manual*, Sen. Doc. No. 47, 83d Cong., 1st Sess. (1953), pp. 216-217. In 1934, the investigation was extended to Nazi propaganda activities. *Id.*, pp. 217-218. During the years 1930-1940, it was shown that the alien political philosophies of the right and left had created divided loyalties in this country. For example, William Z. Foster, the leader of the Communist Party of the United States, testified in 1931 that the "more advanced workers" in this country "look upon the Soviet Union as their country" (Hearings before a Special Committee to Investigate Communist Activities in the United States, H.R., 71st Cong., 2d Sess., part I, vol. 4, p. 384).

Also significant were the 1939 hearings before the House Committee on Un-American Activities, in which the testimony of such witnesses as Benjamin Gitlow and Earl Browder, as well as a mass of documentary evidence, tended to show the subservience of the American Communist Party to the Soviet Union (Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, *passim*). Congress had before it the *Theses, Statutes, and Conditions of Admission to the Third (Communist) International*, adopted at the Second World Congress of the Communist International in 1920 (*id.*, vol. 7, pp. 4668-4671).^{*} Among the "conditions"

^{*}These *Theses, Statutes, and Conditions of Admission* were in evidence in the present proceeding (A.G. Ex. No. 8, R. 1318-1332). They are also set forth in *Blueprint for World Conquests as Outlined by the Communist International* (Human Events, 1946), pp. 33-72.

which a party aspiring to join the International was required to accept were: willingness to combine illegal with legal work to advance the objective of a world proletarian dictatorship (condition 3); willingness to infiltrate and carry on propaganda and agitation in military organizations (condition 4); renunciation of "social patriotism," and systematic demonstration to the working class of the necessity of a "revolutionary overthrow of capitalism" (condition 6); recognition of the necessity of "complete and absolute rupture with reformism and the policy of the 'centrists'" (condition 7); willingness to carry on "systematic and persistent Communist work in the labor unions" and to form "Communist nuclei" within unions to the end that they should be "[won] over * * * to Communism" (condition 9); willingness to "remove all unreliable elements" from "the personnel of their parliamentary factions" and to ensure the subjection of such personnel to the "Central Committee of the party" (condition 11); the maintenance of "iron discipline" on the basis of the "principle of democratic centralization" to the end that the "party centre" may enjoy "the confidence of the party membership" and be "endowed with complete power" over it (condition 12); willingness to "render every possible assistance to the Soviet Republics in their struggle against all counter-revolutionary forces" and to carry on "propaganda to induce the workers to refuse to transport any kind of military equipment intended for fighting against the Soviet Republics" (condition 14); recognition of the "binding" force of all resolutions of

congresses of the Communist International and of its Executive Committee on "all parties joining the Communist International" (condition 16); and exclusion from the party of all members who "reject in principle the conditions and theses" (condition 21).⁹

Congress was informed that these "conditions" governed the relationship between the American Communist Party and the International (Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, pp. 4308-4311, 4667-4668). For example, in 1929, the Executive Committee of the International, under the personal leadership of Stalin and Molotov, decided upon and enforced the replacement of the Lovestone-Gitlow leadership of the American Party by that of Foster and Browder. When Lovestone and Gitlow defied the Executive Committee, Stalin made a speech reminding them of the fate of Trotsky and Zinóviev (*id.*, p. 4432),¹⁰ and the Party's organ, the *Daily Worker*, stated editorially on June 1, 1929, that (*id.*, p. 4671)—

* * * Comrades Lovestone and Gitlow in their declaration of May 14 refused to accept the address or to carry it out, and even went to the length of stating that they would actively oppose it. They are thus entering

⁹ *Blueprint for World Conquest as Outlined by the Communist International* (Human Events, 1946), pp. 66-72; Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, pp. 4669-4671.

¹⁰ The full text of this speech is set forth in the Appendix to the Hearings before a Special Committee to Investigate Communist Activities in the United States, H.R., 71st Cong., 2d Sess., part I, pp. 876-882.

upon a course leading toward an attempt to split the party, *a course in violation of the 21 conditions and the statutes of the Comintern.* [Emphasis added.]

Thus, by 1939, there was a mass of oral and documentary evidence collected by the House Committee on Un-American Activities over the previous nine years, from which it could be concluded that both the Communist International and the Communist Party of the United States were devoted to the establishment of a proletarian dictatorship by force and violence, and that the American Communist Party was completely controlled both as to policy and leadership by the Soviet Union through the Communist International. See *Internal Security Manual*, Sen. Doc. No. 47, 83d Cong., 1st Sess., pp. 216-219; see also H. Rep. No. 153, 74th Cong., 1st Sess. (1935), p. 21.

Congress endeavored to deal with this problem in several ways. In the portion of the Alien Registration Act of 1940, c. 439, 54 Stat. 670, known as the Smith Act—i.e., Sections 2, 3, and 5 (now consolidated in 18 U.S.C. 2385)—it was made a criminal offense to advocate the overthrow of the Government by force and violence or to conspire so to advocate.¹¹ The problem of the dissemination of foreign propaganda was approached by the method of disclosure. In 1938, Congress enacted the Foreign Agents Registration Act, c. 327, 52 Stat. 631, 22 U.S.C. 611-621, requiring

¹¹ The constitutionality of this provision, as applied to a conspiracy charge against eleven of petitioner's national officers for the period from April 1, 1945, to July 20, 1948, was upheld in *Dennis v United States*, 341 U.S. 494.

the registration of any individual or organization acting as the domestic agent of a foreign principal and requiring information as to the identity of the principal and the terms of the contract. The committee reports on the bill which became that Act both stated as follows (H. Rep. No. 1381, 75th Cong., 1st Sess., pp. 1-2; S. Rep. No. 1783, 75th Cong., 3d Sess., pp. 1-2):

Incontrovertible evidence has been submitted to prove that there are many persons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government.

* * * * *

This required registration will publicize the nature of subversive or other similar activities of such foreign propagandists, so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our democratic form of government, or propaganda for the purpose of influencing American public opinion on a political question.

* * * * *

We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda. We feel that our peo-

ple are entitled to know the sources of any such efforts, and the person or persons or agencies carrying on such work in the United States.

Various difficulties in the enforcement of the Foreign Agents Registration Act (see Report of the Institute of Living Law, 87 Cong. Rec., Appendix, pp. A4417-4419 (1941); Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure* (1943), 10 Univ. of Chi. L. Rev. 107) resulted in its amendment by the Act of April 29, 1942, c. 263, 56 Stat. 258, which strengthened the provisions and transferred the administration of the Act from the Secretary of State to the Attorney General. The Reports of the Attorney General to Congress on the Administration of the Foreign Agents Registration Act (which are required by 22 U.S.C. 621) detail the operation of that statute.

The purpose of Congress to expose the foreign origin of various propaganda activities was, however, not fully achieved, partly because of an increased tendency to bring information services under the aegis of diplomatic immunity (see Report of the Attorney General on the Administration of the Foreign Agents Registration Act, 1945-1949, p. 8; 1950 Report, pp. 5-6; 1951 Report, pp. 6-7), and partly because of controversy as to the scope of the "agency" covered by the statute. See *Viereck v. United States*, 318 U.S. 236, 242; *United States v. German American Vocational League*, 153 F.2d 860, 864 (C.A. 3), certiorari denied, 328 U.S. 833; *United States v. Peace Information Center*, 97 F. Supp. 255, 258-259

(D. D.C.). The necessity of proving the fact of agency within the context of a criminal trial made difficult the enforcement of the Act against organizations which threw a "smoke screen" around their operations and obscured the sources and nature of their foreign control.

On October 17, 1940, Congress passed the so-called Voorhis Act, c. 897, 54 Stat. 1201 (now 18 U.S.C. 2386), requiring the registration, *inter alia*, of any organization "subject to foreign control which engages in political activity." The phrase "subject to foreign control" was defined in Section 1 of the Act as follows:

(e) An organization shall be deemed "subject to foreign control" if (1) it solicits or accepts financial contributions, loans, or support of any kind, directly or indirectly, from, or is affiliated directly or indirectly with, a foreign government or a political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or political subdivision thereof, or a political party in a foreign country, or an international political organization, or (2) its policies, or any of them, are determined by or at the suggestion of, or in collaboration with, a foreign government or political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or a political subdivision thereof, or a political party in a foreign country, or an international political organization.

The House Committee on the Judiciary, in its report on the bill which became the Voorhis Act, said with

respect to the purposes of the bill (H. Rep. No. 2582, 76th Cong., 3d Sess., p. 1):

Freedom of political expression is a fundamental principle of democracy. A serious problem arises, however, where political organizations exist in a democracy which are substantially controlled or directed by a foreign power and seek to pursue a policy in a democracy like the United States for the benefit of that foreign power.

* * * * *

The principle upon which this bill is based is that there is no place in a democracy for undercover political organizations. Without in any way interfering with freedom of political activity, the passage of this legislation would mean that it would be unlawful for any political activities, inimical to the constitutional government, to be carried on, unless the full facts concerning such activities are made known.

It soon became apparent that there were also difficulties in the enforcement of the Voorhis Act. See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure* (1943), 10 Univ. of Chi. L. Rev. 107, 122-133. Since religious, charitable, scientific, literary, and educational organizations were excluded from the Act's coverage, propaganda organizations could seek to avoid registration by styling themselves under one of the excluded categories. There was no express provision making the officers guilty if a corporation or association failed to register. In the case of a corporation or unincorporated association without funds for the payment of

finer, there were no appropriate sanctions to enforce compliance. While it was originally anticipated that both the Communist Party and the German-American Bund would have to register under the Act (H. Rep. No. 2582, 76th Cong., 3d Sess., p. 2), the restricted meanings given to the terms "subject to foreign control" and "political activity" by the Act itself made avoidance of registration possible through the device of a claimed divorce. For example, the Communist Party, at its 1940 convention, adopted a resolution which provided, *intèr alia* (C.P. Ex. 13, p. 15):

That the Communist Party of the U.S.A., in Convention assembled, does hereby cancel and dissolve its organizational affiliation to the Communist International, as well as any and all other bodies of any kind outside the boundaries of the United States of America, for the specific purpose of removing itself from the terms of the so-called Voorhis Act, which originated in the House of Representatives as H.R. 10094, which has been enacted and goes into effect in January 1941, which law would otherwise tend to destroy, and would destroy, the position of the Communist Party as a legal and open political party of the American working class * * *.

This disaffiliation and its stated purpose are not disputed by petitioner. Its spurious character was demonstrated by the testimony in this case. See Modified Report of the Board at R. 2510, 2512-2515.

In addition, the Voorhis Act provided no adequate administrative machinery to search out the true facts regarding control by foreign dictatorships and the

real objectives of domestic organizations believed, with reason, to be subversive but which veiled their true ends behind a facade of respectability. That Act was addressed only to the formal, overt aspects of a particular group, and failed to reach the true but secret purposes which lay beneath the surface and which constituted a real threat to the security of the United States. See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Suppression* (1942), 37 Ill. [Northwestern Univ.] L. Rev. 193, 204-205; Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948), 34 Corn. L. Q. 182, 201; Moore, *The Communist Party of the USA: An Analysis of a Social Movement* (1945), 39 Am. Pol. Sci. Rev. 31, 36-37.

After the cessation of hostilities in World War II, events occurred and facts were uncovered which tended to show more clearly the nature and dimensions of the danger. Communist regimes were established in several countries other than the Soviet Union, and elsewhere Communist parties attained considerable strength. The methods by which these regimes seized power—for example, in Czechoslovakia—were not unknown or unnoted in this country.¹² Moreover, there came to light direct evidence of espionage. The revelations of Igor Gouzenko, a clerk on the staff of Colonel Zabotin, Soviet Military Attaché in Canada, led to the establishment of a Royal Commission in

¹² Some details of this history are set forth in the Government's brief in *Dennis v. United States*, No. 336, Oct. Term, 1950, pp. 199-203.

Canada to investigate espionage activities being conducted through that office. After hearing the testimony of many witnesses and considering a mass of documentary materials, the Commission concluded in a thorough report that the Soviet Union, acting through Canadian Communists, was attempting to infiltrate every sensitive agency of the Canadian government and its defense establishments and had to a great extent succeeded. *Report of the Royal Commission to Investigate the Facts Relating to and the Circumstances Surrounding the Communication by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power* (1946). The Report revealed that local agents, trained in Fifth-Column methods, passed information to Soviet officers within the Embassy, who were frequently members of the N.K.V.D. (Soviet secret police) in direct communication with Moscow (*id.*, pp. 11-13). It was found from documents emanating from the Soviet Embassy that the Communist International, or Comintern, the dissolution of which had been announced in Moscow in 1943, continued to exist and to be active in espionage work on this continent (*id.*, pp. 37-41). The Report quoted a statement by Gouzenko that (*id.*, p. 37)—

The announcement of the dissolution of the Comintern was probably the greatest farce of the Communists in recent years. Only the name was liquidated, with the object of reassuring public opinion in the democratic countries. Actually the Comintern exists and continues its work * * *

"The documents which Gouzenko brought with him," the Royal Commission commented, "corroborate this testimony" (*ibid.*).

The Commission found that the main recruiting ground for espionage agents was the illegally constituted Communist Party of Canada. The Communist cells, which posed as study groups, were the contact points for the agents (*id.*, pp. 44-48, 69-83). Often a particular Communist agent would be selected for Colonel Zabotin's group on orders directly from Moscow (*id.*, pp. 44-48). It was shown by documentary evidence that the national organizer for the Communist Party of Canada was instructed in 1945 to recruit espionage agents in the defense establishments of the Canadian government (*id.*, pp. 48-49, 97). Money to pay for espionage services was paid to some of the Canadian agents by the Soviet Embassy (*id.*, pp. 59-68).¹³

In England, the scientist Klaus Fuchs, a Communist, confessed to espionage of the gravest character

¹³ Legal proceedings against some of the persons mentioned in the Report of the Royal Commission are reflected in *Rex v. The King*, 3 [1947] D.L.R. 618, 88 Can. Cr. Cas. 114; *Boyer v. The King*, 94 Can. Cr. Cas. 195 (1948); *Rex v. Mazerall*, 4 [1946] D.L.R. 791, [1946] Ont. Rep. 762; *Rex v. Lunan*, 3 [1947] D.L.R. 710, [1947] Ont. Rep. 201; *Rex v. Harris*, [1947] Ont. Rep. 461; *Rex v. Smith*, [1947] Ont. Rep. 378; *Rex v. Gerson*, [1947] Ont. Rep. 115.

against the United Kingdom and the United States. See the New York Times, February 11, 1950, p. 2.¹⁴

Investigations in the United States by Congressional agencies led to similar conclusions. See *The Shameful Years: Thirty Years of Soviet Espionage in the United States*, H. Rep. No. 1229, 82d Cong., 2d Sess. It was found that the Soviet Union established organizations in the United States ostensibly for commercial purposes, but actually to act as a funnel for intelligence work (*id.*, pp. 5-7, 15). Testimony by former Communist agents showed that Communist espionage groups had successfully infiltrated certain strategic areas of the Government and maintained liaison with Soviet Embassy officials. See *Interlocking Subversion in Government Departments* (Report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Senate Committee on the Judiciary, 83d Cong., 1st Sess., dated July 30, 1953); see also *United States v. Hiss*, 185 F. 2d 822, 829 (C.A. 2), certiorari denied, 340 U.S. 948. Espionage agents

¹⁴ Since the passage of the Subversive Activities Control Act, in September 1950, the world has become acquainted through the defection of Petrov with Soviet espionage in Australia (see New York Times, September 15, 1955, pp. 1, 14, 15); with the case of McLean and Burgess, the British diplomats, who fled to the Soviet Union; with subsequent defections from this country; and with Soviet espionage here.

were believed to have obtained highly confidential data regarding nuclear experiments in progress at the radiation laboratories of the University of California, and regarding atomic energy experiments in a laboratory at Columbia University at an early stage. *The Shameful Years, etc., op. cit, supra*, pp. 31, 35. Later, after the passage of the Subversive Activities Control Act, atomic and radar information was proved to have been passed to the Soviet Union by an international group. See *United States v. Rosenberg*, 195 F. 2d 563, 589, 598-601 (C.A. 2), certiorari denied, 345 U.S. 965; see also *Abel v. United States*, 362 U.S. 217.

In 1949, after a protracted trial, Eugene Dennis and ten other leaders of the Communist Party were found guilty of violating the Smith Act, and the evidence produced at the trial furnished further proof of the attitudes and actions of the Party's top ranks, and their relationship to the Soviet Union. The convictions were affirmed, with an exhaustive opinion by Judge Learned Hand, on August 1, 1950, 183 F. 2d 201 (C.A. 2), slightly less than two months before the final enactment of the Act involved here. This Court later affirmed the Second Circuit, *Dennis v. United States*, 341 U.S. 494, without finding it necessary to review the sufficiency of the evidence.

Armed warfare began in Korea in June 1950.

Thus, Congress had reason to believe, in September 1950, that the dissolution of the Communist International in 1943 had been merely a subterfuge and that there remained in existence a world Communist movement which endangered the security of the United

States.¹⁵ This was the problem with which Congress undertook to deal in the Subversive Activities Control Act of 1950.

B. THE IMMEDIATE EVOLUTION OF THE ACT

The Subversive Activities Control Act was the final distillate, after more than two years of study, of a number of different bills. Efforts were made to remove objectionable features from early drafts and to define with precision the terms employed without leaving the remedial legislation vulnerable to the kind of calculated avoidance that had been the prime weakness of previous registration statutes.

The so-called "Mundt-Nixon" bill (H.R. 5852, 80th Cong., 2d Sess.) was introduced in the House and referred to the Committee on Un-American Activities on March 15, 1948 (94 Cong. Rec. 2893). As amended and reported out, Section 8 of the bill provided for registration with the Attorney General by "Communist political organizations" and "Communist-front organizations." The Attorney General was authorized under Section 13, either on his own initiative or at the request of either House of Congress, to make an investigation and conduct hearings to ascertain whether an organization was required to register.

In its report on the bill, the Committee on Un-

¹⁵ See, in addition to the materials referred to in the text, *The strategy and Tactics of World Communism* (Report of the House Foreign Affairs Committee's Subcommittee No. 5 on National and International Movements), H. Doc. No. 619, 80th Cong., 2d Sess. (1948), pp. 3-4.

American Activities cited the fact that the Foreign Agents Registration Act of 1938 and the Voorhis Act of 1940, while "directed against both Nazis and Communists," had "proved ineffective against the latter, due in part to the skill and deceit which the Communists have used in concealing their foreign ties" (H. Rep. No. 1844, 80th Cong., 2d Sess., p. 5). It was also stated that, while the Alien Registration Act of 1940—i.e., the Smith Act—made it a crime to advocate the overthrow of the Government of the United States by force and violence, and "[w]hile force and violence is without doubt a basic principle to which all Communist Party members subscribe, the present line of the Party, in order to evade existing legislation, is to avoid wherever possible the open advocacy of force and violence" (*ibid.*). The report also indicated that ten years' investigation by the Committee had established (*id.*, p. 2)—

(1) That the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institutions in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

The Senate Judiciary Committee, to which the House bill was referred, sought the advice of several prominent lawyers and the then Attorney General as to the constitutionality of the bill (see 94 Cong. Rec. 9028). The legal memoranda received in response to this request are set out at pp. 415-428 of Hearings before the Committee on the Judiciary, Senate, 80th Cong., 2d Sess., on H.R. 5852; see also *id.*, pp. 428-488.¹³ The principal objection of those who thought the bill had constitutional defects was that the bill used such terms as "Communist political organization" and "Communist-front organization" without adequately defining those terms, and therefore furnished the Attorney General with no definite legislative guide in determining whether an organization was required to register.

A new version of the bill was prepared (see 94 Cong. Rec. 9028, 9029-9032). It more specifically defined in its Section 3 the terms "Communist political organization" and "Communist-front organization," and set forth in Section 7 the duty of such organizations to register with the Attorney General and to file annual reports. In place of the provision for an administrative determination by the Attorney General, the new bill (Sections 12, 13) provided for a Subversive Activities Board which was to make the determination as to whether a given organization was required to register, with further provision for judicial review of its determinations.

¹³ See also the analysis of the bill in Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948-1949), 34 Corn. L. Q. 182-219, 352-375.

The redrafted bill—known as the “Mundt-Ferguson-Johnston” bill—was introduced in the First Session of the 81st Congress as S. 2311.” The opinions of various prominent attorneys were again solicited and the consensus appeared to be that in respects here relevant the bill met the constitutional objections theretofore raised and at the same time avoided the weaknesses of prior legislation (S. Rep. No. 1358, 81st Cong., 2d Sess., pp. 7, 16-17).

The Internal Security Act, of which the Subversive Activities Control Act is a constituent part (Title I), was passed on September 23, 1950, over the President's veto. Both the House and Senate committee reports reemphasized the pressing need for bringing Communist organizations out in the open through the medium of registration requirements (H. Rep. No. 2980, 81st Cong., 2d Sess., on H.R. 9490; S. Rep. No. 2369, 81st Cong., 2d Sess., on S. 4037; S. Rep. No. 1358, 81st Cong., 2d Sess., on S. 2311). The House committee report reiterated the fact that prior legislation directed to this end had been ineffectual against the Communist Party itself, and cited the fact that 30 of the 70 major countries of the world had outlawed the Communist Party (H. Rep. No. 2980, 81st Cong., 2d Sess., p. 2). The report further noted that the Committee had rejected proposals to outlaw the Communist Party or to make membership therein illegal *per se*, and emphasized that the “Communist

¹⁷ S. 2311 evolved after extensive hearings before a subcommittee of the Senate Judiciary Committee from S. 1194 and S. 1196, which were originally introduced in the 81st Congress.

organization of the United States" was not made guilty of any offense by reason of the enactment of the Act (*id.*, p. 5).

C. THE STRUCTURE AND PROVISIONS OF THE ACT

The Subversive Activities Control Act is Title I of the Internal Security Act of 1950, c. 1024, 64 Stat. 987, 50 U.S.C. 781-798. It has been twice¹¹ amended—once, in a relatively minor detail (see *infra*, p. 70), by the Act of July 29, 1954, c. 646, 68 Stat. 586, and again, in a more substantial manner, by the Communist Control Act of August 24, 1954, c. 886, Sections 6-11, 68 Stat. 775, 777-780. In view of the length of the Act and the complex interlocking of its numerous sections and subsections, a summarization of its principal provisions may be helpful. Rather than a mere section-by-section summary, the effort will be to present an over-all view showing the structure of the Act, with emphasis on the essentials of the registration scheme and the nature of the so-called "sanctions"—the legal consequences which attach to an organization's act of registering (or being ordered to register)—both as they affect the organization itself, considered as an entity, and as they affect individual members of the organization and others.

¹¹Exclusive of a 1952 amendment increasing the salaries of Board members from \$12,500 to \$15,000 per annum (Act of July 12, 1952, c. 697, 66 Stat. 590); and a 1955 amendment relating to tenure of Board members (Subversive Activities Control Board Tenure Act, 69 Stat. 539).

1. The congressional findings as to the necessity for the legislation

Section 2 sets forth in fifteen numbered paragraphs certain findings—based on “evidence adduced before various committees of the Senate and House of Representatives”—which convinced Congress of the necessity for the legislation. Congress found, for example, that “[t]here exists a world Communist movement” consisting of a “world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization” (Section 2(1)). The “direction and control” of this movement was found to be “vested in and exercised by the Communist dictatorship of a foreign country,” not named in the Act (Section 2(4)). This foreign Communist dictatorship, it was further found, establishes “action organizations” in various countries, these organizations being part of a world-wide Communist organization and controlled by the foreign dictatorship (Section 2(5)). These “Communist-action organizations” seek to bring about “the overthrow of existing governments by any available means, including force if necessary” and to set up in their stead local Communist dictatorships subservient to the parent dictatorship (Section 2(6)). These Communist organizations “are organized on a secret, conspiratorial basis” and operate to a substan-

tial extent through organizations known as "Communist fronts," which are maintained and used so as to conceal their true character and membership (Section 2(7)). Finally, Congress found (Section 2 (15))—

The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far ~~extended~~ by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and design to prevent it from accomplishing its purpose in the United States.

2. "Communist-action" and "Communist-front" organizations

"Communist-action organization."—The Act defines a "Communist-action organization" as "any organization in the United States" other than one diplomatically accredited which "is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2" and which "operates primarily to advance the objectives" of that movement "as referred to in section 2" (Section 3(3)).

"Communist-front organization."—A "Communist-front organization" is defined as "any organization in the United States" which is "substantially directed, dominated, or controlled by a Communist-action organization" and "is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement" (Section 3(4)).

3. The registration scheme

The heart of the Act—the organizational registration requirement—is contained in Section 7.

The duty of Communist-action and Communist-front organizations to register with the Attorney General.—Each Communist-action organization (Section 7(a)) and each Communist-front organization (Section 7(b)) is required to "register with the Attorney General on a form prescribed by him by regulations" as the one or the other type of organization. *Regis-*

tration is to be effected within thirty days after enactment of the Act (Section 7(c)(1)), or, in the case of an organization which becomes registerable after the Act's passage, within thirty days after becoming registerable (Section 7(c)(2)). In the case of an organization which does not voluntarily register and which is subsequently ordered to register by the Subversive Activities Control Board, registration must be effected within thirty days after the Board's order becomes final¹⁸ (Section 7(c)(3)).

The registration statement.—The registration process includes the submission of a registration statement, to be prepared in accordance with regulations, containing certain specified information (Section 7(d)). The information is to include (1) the name and address of the organization, (2) the name, address, title, and duties of each officer of the organization, including each person who has been an officer at any time during the preceding year, (3) an accounting of all funds received and spent by the organization during the preceding year, including the sources of the funds and the purposes of the expenditures, (4) (applicable to action organizations only) the name and address of each member of the organization, including each person who has been a member at any time during the preceding year, (5) any aliases that may ever have been used by any officer or member required to be

¹⁸The process leading to an order by the Board to register is provided for in Section 13 (see *infra*, pp. 71-73). The conditions under which a Board order becomes final are set forth in Section 14(b) (see *infra*, p. 77).

listed, and (6)²⁰ a list of all printing presses and other mechanical devices used in printing in the possession or control of the organization, its officers, or members.

Annual reports.—Annual reports are required to be submitted to keep the initial registration statement up to date (Section 7(e)).

Records required to be kept.—Accurate financial records are required to be kept by all registered organizations (Section 7(f)(1)). In addition, action organizations are required to keep accurate membership lists (Section 7(f)(2)).

Remedies open to persons claiming to be wrongly listed.—Section 7(g) provides certain remedies for persons who are listed by reporting organizations as being officers or members and who deny that they are such. The Attorney General is required to notify all individuals whom reporting organizations list as officers or members that they have been so listed. Any listed individual who denies that he is an officer or member may request the Attorney General to strike his name from the statement. In that event, the Attorney General is required to investigate the matter, and if he is satisfied that the denial is correct, he is to strike the individual's name. If he is not satisfied that the denial is correct and declines to strike the name, or if he fails to strike it within five months after receiving the request, the individual may petition the Board pursuant to Section 13(b) for an order requiring the Attorney General to strike his name.

²⁰ Added by the Act of July 29, 1954, c. 646, 68 Stat. 586.

Publication to constitute notice.—Upon the registration of an organization, the Attorney General is required to publish in the Federal Register the fact that the organization has registered as a Communist-action or Communist-front organization as the case may be (Section 9(d)). Such publication, it is provided, "shall constitute notice to all members of such organization that such organization has so registered" (*ibid.*).

Keeping of registers.—The Attorney General is required to keep registers of all organizations which register, consisting of the names and addresses of the organizations and their registration statements and annual reports (Section 9(a)). The registers are to be open to public inspection, except that the name of any person listed by an organization as being an officer or member who denies his status as such may not be made public pending determination by the Attorney General of the correctness of the listing (Section 9(b)).

4. Proceedings before the Board leading to orders requiring organizations to register

Section 13 of the Act provides for quasi-judicial proceedings before the Subversive Activities Control Board leading to orders requiring, or refusing to require, organizations claimed by the Attorney General to be action or front groups to register with him as such. The Board itself is established and its general powers and functions defined in Section 12.

The petition by the Attorney General.—Whenever the Attorney General has reason to believe that any

organization which has not registered under Section 7(a) as an action organization or under Section 7(b) as a front organization "is in fact an organization of a kind required to be registered under such subsection," he is required to file with the Board and serve upon the organization a petition for an order requiring the organization to register (Section 13(a)).

Hearings before the Board.—Upon the filing of such a petition, the Board (or any member or a designated examiner) holds a hearing to inquire into the facts regarding the organization's registerability (Section 13(c)). The administration of oaths and the issuance of subpoenas are provided for (*ibid.*). Hearings are public, and each party is entitled to present its case with the assistance of counsel, to offer oral or documentary evidence, and to cross-examine opposing witnesses (Section 13(d)).

Types of evidence required to be considered.—Section 13(e) sets forth in eight numbered paragraphs certain types of evidence which the Board is required to consider in determining whether an organization is a Communist-action organization under Section 3(3). For example, the Board is to take into consideration—

- (1) the extent to which its [the organization's] policies are carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section

* * *

Similarly, Section 13(f) sets forth evidential factors required to be taken into consideration in determining whether an organization is a front group under Section 3(4).

Reports and orders.—If the Board determines that the organization is a Communist-action or Communist-front organization, it must make a report stating its findings of fact and issue an order requiring the organization to register (Section 13(g)(1)). If it determines that the organization is not such a group, it so reports and issues an order denying the Attorney General's petition (Section 13(h)(1)).

Publication to constitute notice.—When an order of the Board requiring registration of a Communist-action organization becomes final (see *infra*, p. 77), that fact must be published in the Federal Register and such publication is declared to "constitute notice to all members of such organization that such order has become final" (Section 13(k)).

5. The duty of individuals to register under certain circumstances

The Act also imposes upon individuals a duty to register under certain circumstances.

(a) Officers required to effect an organization's registration

If a Communist-action or Communist-front organization should fail to register or to file a registration statement or annual report as required by Section 7, it is the duty of the executive officer and of the secretary of the organization (or the individuals performing the usual duties of such officers), and of such

other officers as the Attorney General may by regulations prescribe,²¹ to register for the organization or to file the registration statement or annual report, as the case may be (Section 7(h)).

(b) Personal registration by members of Communist-action organizations

Conditions under which required.—The Act specifies two conditions under which members of a Communist-action organization are required to register personally with the Attorney General. First, if there is in effect a final order of the Board requiring the action organization to register and more than thirty days elapse without compliance, it becomes the duty of each member of the organization to register personally (Section 8(a)). Secondly, if a Communist-action organization registers but fails to include the names of all its members on the membership list it files, each member not on the list who knows the organization to be registered and to have omitted his name must himself register within sixty days after obtaining such knowledge (Section 8(b)). In either case the individual is required to file a registration statement containing such

²¹ Pursuant to this authority, the Attorney General has designated the following additional officers as sharing with those named in the Act the responsibility of effecting the registration of an organization which is required to register but fails to do so: (a) the president, chairman, or other person who is chief officer; (b) the vice-president, vice-chairman, or person performing the functions of either; (c) the treasurer; and (d) members of the governing board, council, or body. 28 C.F.R. § 11.205.

information as the Attorney General may by regulations prescribe (Section 8(c)).

Proceedings before the Board.—If an individual who the Attorney General believes is required to register under Section 8 does not in fact register, the Attorney General may petition the Board (as in the case of an organization) for an order requiring the individual to register (Section 13(a)).

Hearings.—The Attorney General's petition for an order to require an individual to register is heard by the Board in the same manner as a petition for an order requiring an organization to register (see *supra*, p. 72) (Section 13(c) and (d)).

Reports and orders.—In each instance the Board must make a report stating its findings and issue an order either requiring the individual to register (Section 13(g)(2)) or denying the Attorney General's petition (Section 13(h)(2)).

6. *Fact of registration not admissible in any criminal prosecution and membership not to constitute per se a violation of any criminal statute*

The fact of the registration of any person as an officer or member of any Communist-action or Communist-front organization may not be received in evidence against such person in any prosecution for any alleged violation of any criminal statute (Section 4(f)). In addition, neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of any criminal statute (*ibid.*).

7. Cancellation of registration

The Act establishes procedures whereby an individual or an organization which has once registered—whether with or without an order of the Board commanding him or it to do so—may procure the cancellation of his or its registration in the event of a change in the circumstances which originally required registration.

Application to the Attorney General.—Any organization registered under Section 7 as an action or front group, and any individual registered under Section 8, may, not oftēner than once in each calendar year, make application to the Attorney General for the cancellation of such registration (Section 13(b)).

Petition to the Board.—If the Attorney General denies the application, the organization or individual concerned may, within sixty days after such denial, file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of registration (Section 13(b)).

Hearings.—The petition is heard by the Board in the same manner as a petition by the Attorney General requesting that an organization or individual be directed to register (Section 13(c) and (d)).

Reports and orders.—In each case the Board must make a report stating its findings and issue an order granting (Section 13(i)) or denying (Section 13(j)) the petition.

8. *Judicial review and finality of Board orders*

The Act provides that any party aggrieved by any order of the Board be given full opportunity for judicial review either in the United States Court of Appeals for the District of Columbia Circuit or in the circuit of the petitioning party's residence, with the possibility of further discretionary review by this Court on writ of certiorari (Section 14(a)). On such review the Board's findings of fact, if supported by the preponderance of the evidence, are conclusive (*ibid*).

Exhaustion of judicial review a prerequisite to an order of the Board becoming final.—An order of the Board does not become final, *i.e.*, enforceable, until full opportunity for judicial review has been exhausted or until review is foreclosed by failure to make timely application therefor (Section 14(b)).

9. *The so-called "sanctions," or legal consequences, of an organization's registration or of a final order to register*

When an organization registers under Section 7, or when an order of the Board under Section 13 requiring an organization to register becomes final under Section 14(b), the Act provides for the immediate occurrence of certain legal consequences—some affecting the organization as such, others affecting members of the organization. These consequences are, generally speaking, in the nature of legal disabilities; they have

come to be referred to in these proceedings as "sanctions" (see R. 2082), though this term is not used in the Act. In addition, upon the registration of an organization or when an order directing it to register becomes final, certain limitations are imposed upon the conduct of officers and employees of the United States and of "defense facilities," as defined in the Act, with respect to their relations with the organization and its members. These various legal consequences may be summarized and classified as follows:

(a) *Consequences to the organization as such*

The "labeling" requirements.—When an organization is registered or has been finally ordered to register, any publication of the organization transmitted by mail or in interstate or foreign commerce and intended to be circulated among two or more persons must bear on its face and on any wrapper in which it is contained the printed statement "Disseminated by [name of organization], a Communist organization" (Section 10(1)). Similarly, radio and television broadcasts sponsored by the group must be identified as being "sponsored by [name of organization], a Communist organization" (Section 10(2)). Violation of these provisions by the organization or by any person acting on its behalf is made a punishable offense (Sections 10, 15(c)).

Denial of tax benefits.—Persons making contributions to any organization which is registered or has been finally ordered to register may not deduct the amount of their contributions from their gross taxable income notwithstanding any other provisions of

law (Section 11(a)), and no such organization may claim any tax-exemption privilege specified in Section 101 of the Internal Revenue Code (Section 11(b)).

(b) Consequences to members of the organization

Employment restrictions.—Section 5(a)(1) provides that members of an organization having knowledge or notice that the organization is registered or has been finally ordered to register are prohibited from (A) concealing or failing to disclose their membership in seeking, accepting, or holding any nonelective federal employment, (B) holding such employment, (C) concealing or failing to disclose their membership in seeking, accepting, or holding employment in any defense facility,²² (D) working in any defense facility (this clause is applicable only to members of action organizations); or (E)²³ holding office in or being employed by any "labor organiza-

²² A "defense facility" is defined in Section 3(7) as any plant, factory, airport, vessel, pier, etc. "designated and proclaimed by the Secretary of Defense pursuant to section 5(b)." Section 5(b) authorizes the Secretary of Defense to designate and proclaim, and from time to time revise, a list of facilities with respect to the operation of which he finds that "the security of the United States requires the application of the provisions of" Section 5(a). Section 5(b) further provides for the publication of the list and revisions thereof in the Federal Register and the posting of notices of such designation in conspicuous places on the premises of listed facilities.

²³ Added by the Communist Control Act of 1954, Section 6, 68 Stat. 777.

tion" as defined in the National Labor Relations Act" or representing any employer in proceedings under that Act.

Passports.—Members of an organization having knowledge or notice that the organization is registered or has been finally ordered to register are prohibited from applying for, seeking to renew, using, or attempting to use any passport issued under the authority of the United States (Section 6(a)).

Provisions applicable to aliens.—Alien members of or aliens affiliated with organizations which are registered or have been finally ordered to register are excluded from admission into the United States, are deportable, and are ineligible for naturalization.²⁴ The joining of or affiliating with an organization so registered or required to register, within five years after naturalization, if naturalization occurs after the effec-

²⁴ *I.e.*, "any organization * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. 152 (5).

²⁵ These provisions were originally contained in Sections 22 and 25 of the Subversive Activities Control Act, which amended the immigration and naturalization laws. They are now contained in the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 163, Sections 212(a)(28)(E) (exclusion), 241(a)(6)(E) (deportation), and 313(a)(2)(G) and (H) (ineligibility for naturalization). If the alien can establish that he did not know the organization in question to be a Communist organization when he joined it and did not acquire such knowledge prior to the time it registered or was required to register, the provisions are by their terms inapplicable (except that members of action organizations are declared ineligible for naturalization without such qualifying language).

tive date of the Immigration and Nationality Act of 1952, is declared to constitute *prima facie* evidence, warranting revocation of citizenship in a denaturalization proceeding if not rebutted, of lack of attachment to the principles of the Constitution and of the quality of being well disposed to the good order and happiness of the United States at the time of naturalization.²⁶

(c) *Consequences to government and defense-facility employees in their relations with the organization and its members*

Contributions to registered organizations forbidden.—When an organization is registered or has been finally ordered to register, officers and employees of the United States and of defense facilities,²⁷ having knowledge or notice of that fact, are prohibited from contributing funds or services to such group (Section 5(a)(2)(A)).

Counseling violation of employment provisions.—Section 5(a)(2)(B) makes it a punishable offense for an officer or employee of the United States or of any defense facility, with knowledge or notice that an organization is registered or has been finally ordered to register, to advise or counsel any person whom he knows to be a member of such organization to perform or omit the performance of any act the performance or omission of which would constitute a violation of the employment provisions of Section 5(a)(1) (see *supra*, pp. 79-80).

²⁶ As amended and carried forward in Section 340(c) of the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 163, 261.

²⁷ See *supra*, p. 79, fn. 22, for the definition of "defense facility."

Issuance of passports.—When an organization is registered or has been finally ordered to register as a Communist-action organization, officers and employees of the United States are prohibited from issuing passports to or renewing the passports of any individual who they know or have reason to believe is a member of such organization (Section 6(b)).

10. Criminal penalties

Organizations.—Any organization which has been directed by a final order of the Board to register and which fails to do so within the time allowed, or which fails to file a required registration statement or annual report or to keep records as required, is punishable for each such offense by a fine of not more than \$10,000 (Section 15(a)(1)). Each day of failure to register is a separate offense (Section 15(a)). Each violation of the labeling provisions of Section 10 (see *supra*, p. 78) is similarly punishable (Section 15(c)).

Individuals.—Each individual officer having a duty under Section 7(h) to register or to file a registration statement or annual report on behalf of an organization which has been finally ordered to register (see *supra*, pp. 73-74) is punishable for each failure to fulfill such duty by a fine of not more than \$10,000, or imprisonment for not more than five years, or both (Section 15(a)(2)). Each individual having a duty to register personally under Section 8 (see *supra*, pp. 74-75) is similarly punishable,

provided there is in effect with respect to him a final order of the Board requiring him to do so (Section 15(a)(2)). In either case, each day of failure to register is a separate offense (Section 15(a)). The willful making of a false statement or the willful omission of a fact required to be stated is similarly punishable (Section 15(b)). Each false statement or willful omission constitutes a separate offense (Section 15(b)(1)), and each listing of the name or address of any one individual is to be deemed a separate statement (Section 15(b)(2)).

Any individual who violates any of the employment provisions or the contributions prohibition of Section 5 (see *supra*, pp. 79-80, 81), the passport provisions of Section 6 (see *supra*, pp. 80, 82), or the labeling provisions of Section 10 (see *supra*, p. 78) is similarly punishable for each such offense by a fine of not more than \$10,000, or imprisonment for not more than five years, or both (Section 15(c)).

Act not to affect previously existing criminal statutes.—The Act provides that its provisions are to be construed as being “in addition to and not in modification of existing criminal statutes” (Section 17).

11. *Communist-infiltrated organizations*

The Act as originally passed defined and dealt with but two types of “Communist organization” (Section 3(5))—the Communist-action organization (Section 3(3)) and the Communist-front organization (Section 3(4)). The Communist Control Act of 1954, c. 886,

Sections 7-11, 68 Stat. 775, 777-780, amended the Act so as to define a third category of Communist organization, viz., the "Communist-infiltrated organization," and to enact various restrictive measures with respect to such groups.

Communist-infiltrated organizations are not subject to the registration requirements of the Act. They are, however, subject to Board orders "determining" them to be Communist-infiltrated, which orders, when they become final, entail for such groups some of the same legal consequences which attach to action and front groups when registered or directed to register by a final Board order. "Infiltrated" organizations are defined in Section 3(4A). Proceedings leading to a Board order determining an organization to be Communist-infiltrated are provided for in Section 13A. Such orders are reviewable in the same manner as other orders of the Board (Section 13). The legal consequences which flow from a final Board order determining a group to be infiltrated are set forth in Sections 10, 11, 13A(h), and 13A(j).

12. Separability clause

The Act contains the customary separability clause providing that, if any of its provisions or the application thereof to any person or circumstances is held invalid, the remaining provisions, or the application to other persons or circumstances of any provisions held invalid as to some, shall not be affected thereby (Section 32).

THE SUBVERSIVE ACTIVITIES CONTROL ACT IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO PETITIONER

As we have already pointed out (*supra*, p. 44), what is immediately before the Court is (a) the Board's finding that the Communist Party of the United States is a Communist-action organization under the Act, and (b) the Board's order that the party register as such. The court below held in its original opinion that the Act is an "integrated unit" (R. 2081-2084), and that even at this stage the registration requirements cannot be considered separately from certain of the statutory sanctions "which depend upon or flow from registration of the organization" (R. 2083). We submit, however, that the Court would be justified in declining to pass upon the sanctions (or some of them) until they actually come into play, for the registration provisions—which are directly involved in this proceeding—have a purpose and vitality independent of any sanction.²⁸ "Since all contingencies of attempted enforcement cannot be envisioned in advance of [a statute's] applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an ad-

²⁸ See *infra*, pp. 120-121.

visory opinion upon a statute or a declaratory judgment upon a hypothetical case." *Watson v. Buck*, 313 U.S. 387, 402. See also *United States v. Rumely*, 345 U.S. 41, 48. In any event, the Act's separability clause (see *supra*, p. 84) makes it clear that the registration provisions would survive even if one or more of the sanctions should be held invalid. Indeed, even if certain of the registration requirements (such as the provision for a membership list) may be thought to be invalid, the remaining registration requirements would survive. Cf. *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U.S. 419; *McElroy v. Guagliardo*, 361 U.S. 281, 283.

For these reasons, we shall first consider petitioner's contentions that the hearing and registration provisions are invalid as violative of the free-speech, self-incrimination, and due-process clauses of the Constitution (*infra*, pp. 87-170). We shall then separately reply to the arguments that the sanctions, which become operative when an order of the Board directing an organization to register becomes final, are invalid on various constitutional grounds (*infra*, pp. 170-212). In both aspects, we shall consider the Act's provisions only in so far as they apply to the Communist-action type of group; petitioner has been ordered to register as such a group, and no Communist-front organization—the other type subject to the registration provisions—is before the Court. See *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90; *Watson v. Buck*, *supra*, 313 U.S. at 402; *Electric Bond & Share Co. v. Securities and Exchange Commission*, *supra*, 303 U.S. at 433-439, 443; *Peters v. Hobby*, 340 U.S. 331, 338.

A. THE HEARING AND REGISTRATION PROVISIONS ARE VALID

1. *The First Amendment does not prohibit Congress from requiring registration of, and disclosure of information by, domestic organizations dominated by foreign agencies whose purpose it is to establish a Communist dictatorship in this country*

The heart of the Act is the requirement that Communist-action organizations register with the Attorney General, disclose the names of their officers and members, and give financial accountings (see *supra*, pp. 68-70). A Communist-action organization is defined as any organization in the United States, other than one diplomatically accredited, which is substantially dominated or controlled by "the foreign government or foreign organization controlling the world Communist movement" and which "operates primarily to advance the objectives" of that movement. The "world Communist movement" referred to is that "world-wide revolutionary movement" which Congress in Section 2 found to exist, "whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." After the fullest hearing, the Communist Party has been found to be such a group. Congress has the power to require it to register and disclose information. There is no violation of the First

Amendment either in the statute on its face or in its application to petitioner.

(a) *Free speech and press may be indirectly restrained in proper circumstances*

There is, of course, no better settled principle of constitutional law than that the freedoms guaranteed by the First Amendment are not absolute. *E.g.* *Schenck v. United States*, 249 U.S. 47, 52; *Dennis v. United States*, 341 U.S. 494, 508. Even direct limitations on the freedoms otherwise protected by that Amendment may be permissible where clearly necessary to the effectuation by Congress of an end within its power to bring about. *Schenck v. United States*, *supra*, 249 U.S. at 52; *Dennis v. United States*, *supra*, 341 U.S. at 509-510. *A fortiori*, indirect limitations come within the rule. *American Communications Assn. v. Douds*, 339 U.S. 382, 402-404.

The law is filled with examples of statutes which place indirect restraints on freedom of speech or of the press, but which are nevertheless valid because the statute's objective lies within the power of Congress to bring about, and the restraint is a necessary and appropriate concomitant of the exercise of the power. The Hatch Act validly forbids officers and employees in the executive branch of the Federal Government from taking an active part in political campaigns (Act of August 2, 1939, c. 410, Section 9, 53 Stat. 1148; 5 U.S.C. 118i), notwithstanding the obvious restraints imposed by this prohibition on such officers' and employees' freedom of speech and political expression. *United Public Workers v. Mitchell*, 330 U.S. 75, 94-

104. The Federal Regulation of Lobbying Act (Act of August 2, 1946, c. 753, Title III, Sections 305, 307-308, 60 Stat. 840-842; 2 U.S.C. 264, 266-267) validly requires all "those who for hire attempt to influence legislation or who collect or spend funds for that purpose" to spread on the record pertinent information as to "who is being hired, who is putting up the money, and how much," notwithstanding the incidental inhibitory effect of this requirement on the exercise of First Amendment freedoms. *United States v. Harriss*, 347 U.S. 612, 625-626. The Federal Corrupt Practices Act validly requires all political committees which accept contributions or make expenditures for the purpose of influencing national elections to keep exact accounts of all such contributions and to report publicly the names and addresses of all contributors as well as of persons to whom such expenditures are made (Act of February 28, 1925, c. 368, Title III, Sections 302-305, 43 Stat. 1070-1072; 2 U.S.C. 241-244), though here, too, the requirement unquestionably imposes indirect restraints upon freedom of political expression. *Burroughs v. United States*, 290 U.S. 534.

The unfair-labor-practice provisions of the National Labor Relations Act have led to certain valid restraints on free speech. *National Labor Relations Board v. Virginia Elec. & Power Co.*, 314 U.S. 469; *National Labor Relations Board v. Falk Corp.*, 308 U.S. 453. Newspaper companies are subject to regulation in the public interest, notwithstanding possible incidental restrictive effects on their freedom to pub-

fish. *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 130-133; *Associated Press v. United States*, 326 U.S. 1, 19-20; *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184; *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-193; *Lorain Journal v. United States*, 342 U.S. 143, 155-156. Radio broadcasting stations engaging in certain practices can be denied licenses without unlawfully entrenching on First Amendment rights, despite the indirect restraint on freedom of speech which may result from such denials. *National Broadcasting Co. v. United States*, 319 U.S. 190, 223-227.

Likewise, the Foreign Agents Registration Act validly requires agents of foreign principals to register with the Attorney General and to submit a mass of detailed information relating to the agency relationship (Act of June 8, 1938, c. 327, 52 Stat. 631-633; 22 U.S.C. 611 ff.). *United States v. Peace Information Center*, 97 F. Supp. 225, 261-263 (D. D.C.); see also *Viereck v. United States*, 318 U.S. 236, 241, where the constitutionality of the Act was assumed. The National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, validly denies the benefits of that Act to labor organizations unless each officer ^{takes} takes an oath that he is not a member of the Communist Party (Act of July 5, 1935, c. 372, Section 9(h), as amended by the Act of June 23, 1947, c. 120, Section 101, 61 Stat. 146, ~~29 U.S.C. 159(h)~~). *American Communications Assn. v. Douds*, 339 U.S. 382, 389-412. The postal laws validly require the publishers of newspapers and magazines, as a condition

of their use of second-class mail facilities, publicly to disclose the names of the owners of these publications and to mark with the word "advertisement" all contents the insertion of which has been paid for (Act of August 24, 1912, c. 389, Section 2, 37 Stat. 553; now 39 U.S.C. 233, 234): *Lewis Publishing Co. v. Morgan*, 229 U.S. 288.

The Court has also upheld the provisions of a state statute requiring that associations, having an oath-bound membership, file with a state official sworn copies of their constitutions, oaths of membership, and the names of all officers and members. *Bryant v. Zimmerman*, 278 U.S. 63, 72-73. Recently, in *N.A.A.C.P. v. Alabama*, 357 U.S. 449, an order of a state court for production of the names and addresses of all members and agents of the N.A.A.C.P. was held to be unconstitutional. See also *Batce v. City of Little Rock*, 361 U.S. 516. But the Court based its determination on the ground that "we are unable to perceive that the disclosure of * * * petitioner's rank-and-file members has a substantial bearing" on any interest of the state. 357 U.S. at 464. Significantly, the Court declared that *Bryant v. Zimmerman* "involved markedly different considerations in terms of the interest of the State in obtaining disclosure. * * * In its opinion [in *Bryant*], the Court took care to emphasize the nature of the organization [the Ku Klux Klan] which New York sought to regulate. The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, * * * of which the Court itself took judicial notice."

See also *Barenblatt v. United States*, 360 U.S. 109, 125-134.

In all these and similar cases, the question was not whether some indirect, incidental restraint on complete freedom of speech or of the press might result from the enforcement of the law enacted by the legislature. That there would be some such restraint was apparent. The question was whether the objective of the legislature was one within its power to seek to effect, and, if so, whether the incidental restraint was appropriate and reasonable under all the circumstances, including the end sought to be achieved by the law, as well as the nature, impact, and scope of the restraint. As this Court described the problem in an analogous context in *American Communications Assn. v. Douds*, *supra*, 339 U.S. at 400:

* * * In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the "delicate and difficult task * * * to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

(b) *The evil at which the Act strikes is one of the gravest that could befall the nation*

The evil aimed at by the Hatch Act was the bad effect on government service of "political activity by government employees." *United Public Workers v. Mitchell, supra*, 330 U.S. at 95. The Regulation of Lobbying Act was aimed at the danger that "the voice of the people" might go unheard by Congress due to being "drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *United States v. Harriss, supra*, 347 U.S. at 625. The harm sought to be eliminated by the Corrupt Practices Act was "the corrupt use of money to affect elections." *Burroughs v. United States, supra*, 290 U.S. at 548. The injury at which the Foreign Agents Registration Act was directed was the "spreading [of]-foreign propaganda" in this country by unidentified agents of foreign principals. *Viereck v. United States, supra*, 318 U.S. at 241. The evil aimed at by the non-Communist affidavit clause of the amended National Labor Relations Act was the obstruction of commerce due to "political strikes." *American Communications Assn. v. Douds, supra*, 339 U.S. at 387-389. In all these cases, the fact that incidental and indirect restraints upon "First Amendment freedoms" resulted from the steps taken by Congress to combat those evils was held not to invalidate the legislative remedy adopted. However, the evils at which those statutes were directed, grave

as they were, were relatively trivial compared to the evil at which this Act attempts to strike.

That evil is nothing other than the threatened destruction, through force, violence, and deceit, of our constitutional form of government, the loss of our national independence and of our cherished liberties, and the passing of the nation under the domination of a ruthless foreign dictatorship (Section 2). The world Communist movement, including its domestic manifestations, declared Congress in summing up the purposes of the Act, presents "a clear and present danger to the security of the United States and to the existence of free American institutions, and make[s] it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States" (Section 2(15)).

It is obviously a matter of the gravest concern that there exists in this country such a highly organized conspiratorial group controlled and dominated by a foreign country or foreign organization, the principal efforts of which are directed to furthering the interests of that foreign country or organization to the detriment of the United States. "Antipathy to domination or control by a foreign government," as the court below observed (R. 2085), "or even to interference on the part of a foreign government, is a basic

policy in this nation. It was one of the compelling reasons for the making of the Constitution in replacement of the Confederation."

As we have seen (pp. 46-65), Congress has for thirty years regarded the threat to the United States represented by the Communist movement as a legitimate subject of congressional inquiry and legislation. See also *Internal Security Manual*, S. Doc. No. 47, 83d Cong., 1st Sess., pp. 216-218, where the many hearings held by committees of Congress investigating subversive activities from 1930 to 1953 are synopsized. The general power of Congress not only to conduct inquiries in this area, but to legislate on the basis of the information thus obtained, has been repeatedly recognized by this Court as well as others. *E.g.*, *Barenblatt v. United States*, 360 U.S. 109; *Galvan v. Press*, 347 U.S. 522, 529; *Carlson v. Landon*, 342 U.S. 524, 534-536; *Harisiades v. Shaughnessy*, 342 U.S. 580, 590; *Dennis v. United States*, 341 U.S. 494; *American Communications Assn. v. Douds*, 339 U.S. 382, 387-389; *Lawson v. United States*, 176 F. 2d 49, 51-52 (C.A.D.C.), certiorari denied, 339 U.S. 934; *Barsky v. United States*, 167 F. 2d 241, 244-247 (C.A.D.C.), certiorari denied, 334 U.S. 843; *United States v. Josephson*, 165 F. 2d 82, 88-92 (C.A. 2), certiorari denied, 333 U.S. 838. Indeed, the federal courts, including this Court, have repeatedly recognized the peculiar and dangerous nature of the Communist conspiracy in this country and the world. In particular, the Court has emphasized that the Communist Party is actively engaged in the world-wide

Communist attempt to overthrow the Government of the United States. Therefore, the Court has repeatedly refused to treat it as an ordinary political party in considering the constitutionality of statutes or legislative investigations under the First Amendment.

Mr. Justice Jackson in the portion of his opinion concurring with the majority in *American Communications Assn. v. Douds*, 339 U.S. 382, 423, carefully distinguished the Communist Party "from any other substantial party we have known, and hence [it] may constitutionally be treated as something different in law." He found that Congress, on the basis of material before it, could rationally have concluded that "The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate"; "The Communist Party alone among American parties past or present is dominated and controlled by a foreign government"; "Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal"; and "Every member of the Communist Party is an agent to execute the Communist program" (*id.*, pp. 425, 427, 429, 431). See also Mr. Justice Jackson concurring in *Dennis v. United States*, 341 U.S. 494, 563-566.

In affirming the Smith Act convictions of the principal leaders of the Communist Party, Judge Learned Hand stated in *United States v. Dennis*, 183 F. 2d 201, 212-213 (C.A. 2), affirmed, 341 U.S. 494:

One may reasonably think it wiser in the long run to let an unhappy, bitter outcast vent his

venom before any crowds he can muster and in any terms he wishes, be they as ferocious as he will; one may trust that his patent impotence will be a foil to anything he may propose. * * * Here we are faced with something very different. The American Communist Party * * * is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. * * * The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means. * * * The question before us, and the only one, is how long a government, having discovered such a conspiracy, must wait.

Then, after reviewing the great world-wide Communist danger at the time of the indictment in 1948, Judge Hand went on (*id.*, p. 213):-

We do not understand how we could ask for a more probable danger, unless we must wait till the actual eve of hostilities. * * * [W]e shall be silly dupes if we forget that again and again in the past thirty years, just such preparations in other countries have aided to supplant existing governments, when the time was ripe. Nothing short of a revived doctrine of *laissez faire*, which would have amazed even the Manchester School at its apogee, can fail to realize that such a conspiracy creates a danger of the utmost gravity and of enough probability to justify its suppression.

Mr. Justice Frankfurter, speaking for the Court in *Galvan v. Press*, 347 U.S. 522, 529, stated:

On the basis of extensive investigation Congress [found] in § 2(1) of the [Internal Security] Act that the "Communist movement *** is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship" and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

See also *Carlson v. Landon*, 342 U.S. 524, 535-537; *Harisiades v. Shaughnessy*, 342 U.S. 580, 590. Subsequently, in concurring in *Sweezy v. New Hampshire*, 354 U.S. 234, Mr. Justice Frankfurter (joined by Mr. Justice Harlan) indicated that a fundamental distinction existed between investigation by a Congressional committee of a witness' political beliefs and into his connection with the Communist Party. "Whatever, on the basis of massive proof and in the light of history, of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party" (*id.*, p. 266).

The earlier history of this Court's attitude toward the Communist Party and the attempts of Congress

to deal with it is described at length in *Barenblatt v. United States*, 360 U.S. 109, in which the Court upheld the authority of a congressional committee to inquire whether a witness belonged to the Communist Party. Speaking for the Court, Mr. Justice Harlan said (*id.*, pp. 127-129):

*That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court * * *. In the last analysis this power rests on the right of self-preservation, "the ultimate value of any society," Dennis v. United States * * *. Justification for its exercise in turn rests on the long and accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by Congress [citing Section 2 of the Subversive Activities Control Act].*

*On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. * * * To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party was just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have deter-*

mined the whole course of our national policy since the close of World War II . . .
[Emphasis added.]²⁹

(c) *In the light of the evil, the registration requirement does not invalidly restrict free speech, press, or association*

In the survey we have given of the cases in which the Court upheld legislation touching upon the constitutionally protected areas of political association and expression of ideas (*supra*, pp. 88-92, 99-100), "disclosure" cases are prominent. *United States v. Harris*, 347 U.S. 612, 625 (Registration of Lobbying Act); *Burroughs v. United States*, 290 U.S. 534 (Federal Corrupt Practices Act); *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (ownership-disclosure requirements of the postal laws); *Bryant v. Zimmerman*, 278 U.S. 63 (New York Anti-Klu-Klux-Klan statute); cf. *Viereck v. United States*, 318 U.S. 236 (Foreign Agents Registration Act).

The basic rationale underlying all these decisions is that it is in the interest of both free speech and free association that Congress and the public be adequately and correctly informed, at least where the dangers stemming from non-disclosure are serious. As Mr. Justice Black, with whom Mr. Justice Douglas concurred, stated with respect to the Foreign Agents Reg-

²⁹ The Court distinguished the *Sweezy* case on the ground that there the witness had not been shown to be connected with the Communist Party. Inquiry into a witness' connection with the Progressive Party and the content of a lecture "is a very different thing from inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow." 360 U.S. 129.

istration Act in his dissenting opinion in *Viereck v. United States*, 318 U.S. 236, 251:³⁰

Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.

See also *United States v. Peace Information Center*, 97 F. Supp. 255 (D. D.C.). Similarly, in *Harriss* the Court pointed out (347 U.S. at 625-626) the importance of disclosure of facts where a serious evil grows out of secrecy or nondisclosure.³¹

³⁰ The constitutionality of the Foreign Agents Registration Act was not challenged in the *Viereck* case, either in the court of appeals. (*Viereck v. United States*, 130 F. 2d 945 (C.A. D.C.), reversed, 318 U.S. 236; *Viereck v. United States*, 139 F. 2d 847 (affirming conviction following retrial), certiorari denied, 321 U.S. 794), or in this Court. This Court's reversal of *Viereck's* first conviction was based on grounds not material here.

³¹ In addition to judicial approval, the principle of registration and disclosure has been widely recognized by legal writers as a constitutional and desirable remedy against potential abuses of political freedoms. See, e.g., *To Secure These Rights*, Report of the President's Committee on Civil Rights (1947), p. 164; Smith, *Democratic Control of Propaganda Through Registration and Disclosure*, 6 Pub. Opin. Quart. 27 (1942); Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Suppression*, 37 Ill. (Northwestern Univ.) L. Rev. 193, 213; Ernst and Katz, *Speech: Public and Private*, 53 Colum. L. Rev. 620, 626; Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 Mich. L. Rev. 181, 204-213.

In light of our knowledge of the world Communist movement and of the evil to be faced (*supra*, pp. 46-65, 94-100), there would seem to be little doubt that this device of registration and disclosure can properly be applied to the Communist Party, now that it has been found, after full hearing, to be directed and controlled by the Soviet Union and to be operating primarily to advance the objectives of the world Communist movement. See Sutherland, *Freedom and Internal Security* (1951), 64 Harv. L. Rev. 383, 406-407. Congress, on the basis of extensive investigations over a period of many years (*supra*, pp. 50-54, 62), had concluded that much of the danger from Communist activity in the United States is the result of its secrecy. Registration, which means in effect disclosure, was, therefore, an obviously reasonable method of coping with this grave problem. If the leaders of the Communist Party may be imprisoned for conspiring to advocate the overthrow of the Government by force and violence (*Dennis v. United States*, 341 U.S. 494), certainly the Party itself may be compelled to register and disclose its officers, members, funds, and operations. Whatever diminution of the Party's influence or effectiveness results from this publicity—including a possible falling-off in its "peaceful" and "non-seditious" activities—is a valid consequence of the Government's and the public's right to be informed about this particular organization's activities and connections. Its seditious connection with the Soviet Union plainly warrants the kind of disclosure Congress has required. See also

infra, pp. 172-184, for further discussion in connection with the "labeling" sanction.³²

Petitioner, however, contends (Br. 30-33) that the Act suppresses organizations which advocate peaceful change in the American form of government. In actuality, the Act (Section 3(3)) requires the Board, in order to determine an organization to be a "Communist-action organization," to find that the organization "is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 * * * and * * * operates primarily to advance the objectives of such world Communist movement as referred to in Section 2. * * * Section 2 describes the purpose of the World Communist movement as, "by treachery, deceit, infiltration * * * espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship * * * throughout the world" (Section 2(1)). On the basis of overwhelming evidence (see *infra*, pp. 233-263), the Board concluded that petitioner came within this definition of a "Communist-action organization" (R. 2644).

Thus, contrary to petitioner's contention, it is clear that this Act does not attempt to suppress, regulate, or even require disclosure from organizations whose purpose is merely peaceful change in our form of government or which merely intend to advocate unlawful

³² While Section 8, requiring individuals to register in certain circumstances, is not at issue in this case (see *infra*, pp. 126-127), the same considerations support the constitutionality of this provision as the requirement for organizations to register.

means sometime in the future (see Pet. Br. 31). Rather, it requires disclosure from organizations, like petitioner, whose *present activity* is for the purpose of advancing the objectives of the world Communist movement, including as probably its most important goal the overthrow of the Government of the United States by illegal means. While much or even all of such organizations' activities may be peaceful and not in violation of any criminal law at a particular time, we submit that Congress has the constitutional power to require disclosure from such organizations which are actively working for overthrow of the Government and which, together with the world Communist movement as a whole, produce a grave danger that their purpose will be achieved. And even if some of the disclosure requirements of the registration provisions (such as the demand for membership list) may be thought to be invalid, the separability clause of the Act would sustain the membership registration provisions.

Petitioner relies on *Yates v. United States*, 354 U.S. 298 (Br. 31, 32) in contending that the Act is invalid because it fails to require a finding of present incitement to forcible action.³³ It relies on *De Jonge v. Oregon*, 299 U.S. 353, and *Herndon v. Lowry*, 301 U.S. 242 (Br. 34, 35), in claiming that, even when an organization is engaged in such illegal activity, its right to engage in legal activity, such as peaceable assembly and advocacy, cannot be abridged. These criminal cases, however, are plainly inapposite. First, the reg-

³³ *Yates* required such a finding under the Smith Act on the basis of statutory construction in order to avoid a serious constitutional issue. This Court made clear that it was not deciding the constitutional issue. 354 U.S. at 319.

istration provisions of the Subversive Activities Control Act impose no criminal punishment for any action—let alone for speech or advocacy—except for refusing to comply with a final order to register. Thus, the Act involves the less serious “restraint” of registration and disclosure (see *supra*, pp. 93–94). Secondly, the criminal cases which petitioner cites involved prosecutions directly based on speech or assembly which the First Amendment directly protects. In contrast, this Act requires registration of an organization when it is both under foreign Communist domination and the activities are intended to serve the purposes of the world Communist movement including overthrow of the Government of the United States. While such activities may incidentally include speech protected by the First Amendment, this speech is not the basis for requiring the organization to register. Thus, unlike in the criminal cases, whatever restraint does result from the requirement of registration is the indirect result of a statute directed toward a broader and dangerous problem. And as we have shown (pp. 88–92), this Court has constantly applied a very different standard to legislation claimed to impose such an indirect restraint on speech.

These distinctions between criminal prosecutions and the considerably lesser and more indirect restraint of registration and disclosure doubtless explain why the clear and present danger test has never been considered applicable to the latter type of case. Thus, none of the disclosure and registration cases decided by this Court which are cited above (p. 100) even mentions this standard. But even if it were in fact applicable, it is clear that petitioner—hav-

it has been found to be controlled by the Soviet Union and to be operating primarily to advance the objectives of the world Communist movement including the establishment of totalitarian dictatorships throughout the world—constitutes a clear and present danger. Indeed, Congress found such a clear and present danger in 1950 on the basis of its own extensive investigation (Section 2(15)). This determination can hardly be considered unreasonable since Judge Learned Hand likewise found a clear and present danger resulting from the Communist conspiracy in the United States as of 1948 (*United States v. Dennis*, 183 F. 2d 201 (C.A. 2), affirmed, 341 U.S. 494) and this Court has itself repeatedly emphasized the great danger (see *supra*, pp. 96–100). As the court of appeals held, “The activities of a world Communist movement such as that described in this statute and of organizations in this country devoted to its objectives constitute a clear and present danger within any definition of the point at which freedom of speech gives way to the requirements of government security” (R. 2088–2089).

Thomas v. Collins, 323 U.S. 516, on which petitioner also relies (Br. 40, 41), dealt with the wholly different problem of a state requirement that individuals register as a condition of exercising their normal right to make lawful public speeches enlisting support for a lawful and peaceful movement. The Court made clear that the vice of the statute was that the requirement was imposed directly on speech rather than on activities which might incidentally include speech (323 U.S. at 540):

Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed.

Moreover in *Thomas v. Collins*, there was no problem of sedition, subversion, or of a domestic organization controlled by a foreign dictatorship and dedicated to forcible overthrow of this Government. See Sutherland, *Freedom and Internal Security* (1951), 64 Harv. L. Rev. 383, 403-404.

2. *Neither the registration provisions of the Act nor the Board's order violates the Fifth Amendment's prohibition against compulsory self-incrimination*

Petitioner also urges (Br. 44-50) that the registration provisions of the Act, as well as the order under review directing it to register, violate the Fifth Amendment's prohibition against compulsory self-incrimination by forcing the officer of petitioner who signs the registration statement to "admit his membership in the Communist Party and an intimate knowledge of its workings" (Br. 44).

(a) *The present case is not a proper vehicle for the litigation of the self-incrimination issues*

Assuming *arguendo* that the officer or officers who will eventually have the duty to effect the registration of petitioner will be personally privileged to decline to do so, or at least to assert and litigate a claim of privilege, that fact does not render either

the registration provisions of the Act or the registration order invalid. At the present time, the self-incrimination issue is entirely hypothetical since no officers have been called upon to register.

(i) *The privilege against self-incrimination applies only to natural individuals, of whom there is none before the Court at this time*

It is settled that the privilege against self-incrimination "is essentially a personal one, applying only to natural individuals." *United States v. White*, 322 U.S. 694, 698. It may be invoked neither by a corporation (*Wilson v. United States*, 221 U.S. 361; *Essgee Co. v. United States*, 262 U.S. 151, 155-156; *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 205; *Curcio v. United States*, 354 U.S. 118, 122) nor by an unincorporated organization or association, such as petitioner. *United States v. White*, *supra*, 322 U.S. at 699. The order under review is directed against petitioner alone, not against any natural individual, and petitioner alone is before the Court at this time. While it is true that artificial entities such as corporations and unincorporated associations can act only through individuals, sight must not be lost of the simple fact that only natural individuals are protected by the privilege and no such individual is a party to this case.

(ii) *The privilege against self-incrimination must be explicitly claimed and no such claim has thus far been made*

The privilege against self-incrimination is a privilege which must be personally and explicitly claimed. *Quinn v. United States*, 349 U.S. 155, 162;

Emspak v. United States, 349 U.S. 190, 194; *Rogers v. United States*, 340 U.S. 367, 370; *Smith v. United States*, 337 U.S. 137, 150; *United States v. Monja*, 317 U.S. 424, 427; *United States v. Murdock*, 284 U.S. 141, 148; *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 113. "A witness' privilege against self-incrimination," as Judge Bazelon himself stated in an opinion rendered prior to his dissent below, at an earlier stage of this case (see *supra*, p. 5), "must be claimed personally, at the time the alleged incriminating questions are propounded, not before they are asked at all" (*Communist Party of the United States v. McGrath*, 96 F. Supp. 47, 52 (D. D.C.) (concurring opinion), stay denied, 340 U.S. 950). It is "merely an option of refusal, not a prohibition of inquiry." 8 Wigmore, *Evidence*, (3d ed., 1940), § 2268.

There has been no claim of privilege thus far, and, as the court below observed (R. 2096-2097), there may never be one. Since this Court does not anticipate constitutional issues (*Peters v. Hobby*, 349 U.S. 331, 338), petitioner's attempt to litigate the self-incrimination issue in this case, before it is raised, would clearly seem to be premature. Cf. *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U.S. 419, 443. The question of the availability of the privilege to an officer or officers of petitioner will not arise until the order of the Board becomes final and the duty to bring about petitioner's registration comes into being. If at that time a privilege is claimed, it can then be litigated.

Petitioner argues (Br. 44-45, 48-49), however, that the principle requiring that the privilege be claimed to be enjoyed is inapplicable in a proceeding of this type because the Act gives the organization's officers no opportunity to claim the privilege. This contention is untenable. The Act provides a thirty-day period after a registration order becomes final within which to effect registration (Section 7(c)(3)) before criminal liability under Section 15(a) for failure to register is incurred. We believe that that is the period during which an officer of petitioner having the duty to effect petitioner's registration, who desires to claim the privilege, should do so. As for the tribunal before which the claim should be made, we believe that *United States v. Sullivan*, 274 U.S. 259, provides the answer. In that case the Court held that a taxpayer should make his claim of privilege respecting his sources of income in the tax return itself if necessary. So here, by analogy, the privilege could be claimed on the registration form required to be filed with the Attorney General. See also *infra*, pp. 121-125.

In claiming that the privilege need not be asserted under these circumstances, petitioner (Br. 48-49) and the dissenting judge below (R. 2161-2162) relied on *Boyd v. United States*, 116 U.S. 616, as authority. That decision, however, invalidated a statute which presented to a suspected violator of the revenue laws the alternative of either (1) producing his private books and records in refutation of charges alleged by the Government to be based on what those books and records would show or (2) suffering the charges

to be taken as confessed.³⁴ The statute did not contemplate that the suspected violator could be excused from producing his books and records by a claim of the privilege against self-incrimination.

In the context of such a statute, a claim of privilege would have been quite meaningless. For this reason it is not surprising that nowhere in this Court's opinion is there any discussion of the necessity that the privilege against self-incrimination be specifically claimed as a prerequisite to its judicial consideration—the feature of self-incrimination cases so prominently mentioned in all the later cases (see *supra*, pp. 108–109). The statute was held void as necessarily conflicting with the privilege. In the case at bar, on the other hand, there is no reason to believe that a valid claim of privilege will or must be rejected, and certainly this Act, unlike the statute in *Boyd*, does not deny the privilege to a person who could validly

³⁴ The statute provided in pertinent part as follows: "In all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court * * * may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court * * *; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. * * *" (116 U.S. at 619–620).

claim it. In other words, the *Boyd* statute flatly denied the privilege to one who could properly claim it and wished to do so; the Act involved here does no such thing.

Furthermore, as was pointed out by the court below (R. 2100-2101), the *Boyd* case dealt with personal, private papers—a fact on which the *Boyd* opinion laid great emphasis (116 U.S. at 622, 623, 624, 630, 633, etc.) and which was, as the court below said, “a key to the decision” (R. 2100). In all the later cases in which *Boyd* is discussed, this Court has emphasized that feature of the case. See, e.g., *Wilson v. United States*, 221 U.S. 361, 377; *Essgee Co. v. United States*, 262 U.S. 151, 158; *Nathanson v. United States*, 290 U.S. 41, 47; *United States v. White*, 322 U.S. 694, 699; *Shapiro v. United States*, 335 U.S. 1, 33. Here, on the other hand, the books and records which would reflect the data to be included in the registration statement are not personal but organizational records—the distinction which forms the very basis of this Court’s decision in *United States v. White*, *supra*, 322 U.S. 694 (see *supra*, p. 108; *infra*, pp. 121-125).

(iii) *It cannot be assumed that a claim of self-incrimination will inevitably be made or, if made, that it must necessarily be honored*

There are several reasons why it cannot justifiably be assumed at this time that a substantial claim of privilege will inevitably be made and be required to be honored when petitioner is confronted by the statutory requirement that it register.

a. That it should not be assumed that a claim of privilege will inevitably be made is shown by the prior

history of this very case. In 1951, following the Attorney General's filing with the Board of his petition for an order directing registration, petitioner sought in the United States District Court for the District of Columbia to enjoin the Attorney General from proceeding further. The requested injunction was denied by a statutory three-judge court. *Communist Party of the United States v. McGrath*, 96 F. Supp. 47, stay denied, 340 U.S. 950. Judge Bazelon, who dissented below, was one of the members of the three-judge court. As pointed out by Judge Bazelon in his concurring opinion in the injunction proceeding (96 F. Supp. at 50), and recalled in his original dissent below (R. 2163, fn. 39), one of the grounds urged by petitioner for enjoining hearings before the Board was that its defense before the Board required the filing of an answer and the giving of testimony by its officers and that, since "such testimony would necessarily entail their admission of Community Party affiliations" (R. 2163, fn. 39), such officers "will not appear for fear of self-incrimination or, if subpoenaed, will invoke their privilege and, as a result, the Party's defense will necessarily fail" (96 F. Supp. at 50). Notwithstanding these representations, after the dismissal of its suit to enjoin the proceedings from which dismissal it did not appeal, officials of petitioner did appear and testify at the Board hearings (see R. 2650-2651).

This instance shows that the making of a future claim of privilege is never "inevitable," however

likely it may seem or be represented to be. Two of petitioner's three witnesses before the Board, John Gates and Elizabeth Gurley Flynn, voluntarily admitted on the witness stand that they were members of petitioner's governing body, the National Committee of the Communist Party (R. 1199, 1275). Assuming Mrs. Flynn still holds that office,³⁵ she will be among the persons having the duty to effect the registration of petitioner when the order directing such registration becomes final (28 C.F.R. § 41.205(d); see *infra*, p. 115, fn. 36). If she should hereafter invoke the privilege against self-incrimination as justification for refusing to register petitioner, it may well be rejected on the ground that she has waived the privilege by having taken the stand and voluntarily admitted her membership and high official position in petitioner. Cf. *Rogers v. United States*, 340 U.S. 367, 372-373. See the original opinion below, R. 2099.

b. In evaluating the merit or lack of merit of a claim of privilege which an officer of petitioner might hereafter advance, one of the fundamental principles is that the privilege in question is a privilege against self-incrimination. The claimant may not, under the guise of protecting himself against self-incrimination, seek to shield others. *Rogers v. United States*, *supra*, 340 U.S. at 371; *United States v. Murdock*, 284 U.S. 141, 148; *Hale v. Henkel*, 201 U.S. 43, 69; *Brown v. Walker*, 161 U.S. 591, 609.

³⁵ She apparently does continue to hold that office since she was reelected in December, 1959. She has also been recently elected Vice Chairman of the Communist Party and to the National Executive Committee. Gates, however, has resigned from the Party entirely.

Presumably, the basis of any future claim of privilege on the part of an officer of petitioner having the duty to effect the registration will be the tendency of his act of filing the required registration statement to incriminate him under the Smith Act (18 U.S.C. 2385). That is, it will be claimed by the officer required to file the statement that the very act of filing, even if he were to omit his own name from the membership list, would constitute an admission that he is a member and officer of petitioner, and thus furnish "a link in the chain of evidence" required to convict him under that Act. See Pet. Br. 44-45, citing *Patricia Blau v. United States*, 340 U.S. 159, 161. But, as the court below observed, the top officials of petitioner, who are the ones who will have the duty of filing the registration statement,³⁶ "have never attempted to conceal their membership or their places of leadership" (R. 2097). Hence, there is "no basis for assuming that they would claim protection against a mere revelation of their membership" (*ibid.*).

³⁶ Section 7(h) of the Act places the duty of effecting the registration of an organization required by Section 7 to register, and which fails to do so, on "the executive officer (or individual performing the ordinary and usual duties of an executive officer)," "the secretary (or individual performing the ordinary and usual duties of a secretary)," and such other "officer or officers * * * as the Attorney General shall by regulations prescribe." Under the regulations, the following additional officials share the registration duty with those named in the Act: (a) the president, chairman, or chief officer, by whatever title he is known; (b) the vice-president or vice-chairman; (c) the treasurer; and (d) members of the governing board, council, or body. 28 C.F.R. § 11.205.

Furthermore, the validity of a claim of privilege on their part would be on a different footing from a similar claim made by a person not publicly known as a Communist Party member or functionary if he were asked whether he is a member of petitioner. Cf. *Patria Blau v. United States*, *supra*, 340 U.S. 159; *Irving Blau v. United States*, 340 U.S. 332; *Rogers v. United States*, *supra*, 340 U.S. at 372-373. It is a matter of common knowledge that each of the individuals who would have the duty of effecting petitioner's registration when the time comes, if petitioner should fail to register itself, is a member and high official of the Party. Many of them have already been prosecuted and convicted under the Smith Act without the benefit of any forced concessions on their part of membership in petitioner. *Dennis v. United States*, 341 U.S. 494; *United States v. Flynn*, 216 F. 2d 354 (C.A. 2), certiorari denied, 348 U.S. 909.³⁷ It is difficult to believe that a prosecutor, even assuming the Government might ever bring new criminal proceedings against them for violation of the Smith Act, would find it necessary to establish their membership and high official position in petitioner from the fact that they filed a registration statement under the Subversive Activities Control Act. The privilege against self-incrimination, as this Court has emphasized, "presupposes a real danger of legal detriment arising from the disclosure." *Rogers v. United States*, *supra*, 340 U.S. at 372-373. The protection afforded by the privilege

³⁷ All eleven of the defendants in *Dennis* and several of the thirteen defendants in *Flynn* were members of the National Committee of petitioner.

"must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *Mason v. United States*, 244 U.S. 362, 365 (1917), and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination." *Hoffman v. United States*, 341 U.S. 479, 486.

To argue, as does petitioner, that for a member of petitioner's governing board to be required to perform an act which by implication establishes his membership in petitioner amounts to compulsory self-incrimination, when that person has never sought to conceal and indeed has many times conceded his membership, is too mechanical an application of the constitutional guaranty. To force an admission of membership from an obscure or concealed member of petitioner is one thing. See *Patricia Blau v. United States*, *supra*, 340 U.S. 159. To require, for example, the National Chairman of petitioner to effectuate petitioner's registration under the Act and thus, incidentally, to admit what he has never denied or attempted to conceal and what has been indisputably proved—that he is a member and officer of petitioner—is another. In the one case there is "a real danger of legal detriment arising from the disclosure" (*Rogers v. United States*, *supra*, 340 U.S. at 373); in the other, there is nothing of the sort.

Also relevant to the issue of the *bona fides* of the claim of privilege against self-incrimination, in addition to the considerations already mentioned, would

be the fact that, under the express terms of the Act, neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of any criminal statute, and the registration of any person under the Act as an officer or member of any Communist organization may not be received in evidence against such person in any prosecution for any alleged violation of any criminal statute (Section 4(f)). While the latter provision is a limited and not an absolute grant of immunity against prosecution (cf. *Counselman v. Hitchcock*, 142 U.S. 547, with *Brown v. Walker*, 161 U.S. 591, and *Ullman v. United States*, 350 U.S. 422), it is nevertheless a pertinent factor to be considered in evaluating the merit or lack of merit of a claim of privilege, that is to say, the verity of the claimed fear of self-incrimination.

c. It is not our purpose to explore all the ramifications of the question of the possible privilege of an official of petitioner to refuse to effect petitioner's registration on the ground that to do so would tend to incriminate him. On the contrary, our position is, as we have stated, that this question is not in this case at this time and has been prematurely raised by petitioner. Our purpose has been therefore to refute petitioner's contention that (1) the claim is certain to be made eventually, and that (2) when made it must certainly be upheld, so that (3) it should in the interest of economy be settled in this case (4) in favor

of upholding the claim. We submit that it is clear from what has been said that the premises of this argument are untenable; it cannot justifiably be assumed in this case either that a claim of privilege is certain to be made as soon as the order becomes final, or that, if and when made, it will present a plain and simple issue which must be resolved in favor of the claimant.

(iv) *Even assuming that a claim of privilege will be made and must be honored, this would make the order to register at most unenforceable, not void*

Even if it be assumed that a claim of privilege will be made by each and every one of the officials of petitioner having the duty of effecting petitioner's registration (see *supra*, p. 115, fn. 36), and that such a claim must of necessity be upheld, this would not render either the registration provisions of the Act or the order of the Board invalid. The order to register should still be upheld in this proceeding. "[T]he utmost result," as the court below observed, "would be that the statute and order would be unenforceable" (R. 2100) whenever opposed by a valid claim of the privilege against self-incrimination. The distinction is important for at least three reasons. First, the non-enforceability of the order could be removed by a grant of immunity from prosecution for any offense of which a prospective registerer of petitioner might fear to incriminate himself. See *Brown v. Walker*,

161 U.S. 591; *Ullman v. United States*, 350 U.S. 422.³⁸ Second, the non-enforceability of the order to register would not affect the "sanctions" or disabilities which come into being when the order to register becomes final; these have a vitality separate and apart from the registration process and do not depend upon actual registration (see *supra*, pp. 77-82). Third, an important public function is served by the Board's finding that the petitioner is a Communist-action organization and should register, regardless of whether the registration can actually be effectuated; Congress desired to have the facts sifted and established by quasi-judicial proceedings, and then made known to the public (see *supra*, pp. 50-56). Thus, it is significant that Congress gave the Board the power, with regard to "Communist infiltrated" organizations, to make

³⁸ It is probable that such a grant of immunity would require a new statute. The court below suggested the possibility that immunity might be granted under 18 U.S.C. 3486(c), one of the immunity provisions of the Act of August 20, 1954, c. 769, Section 1, 68 Stat. 745 (see R. 2099-2100). It is true, as the court observed that "[u]nder that statute the courts have broad powers to grant immunity, upon application of the Attorney General, in proceedings before them involving violations of the statute here involved" (R. 2099). However, the immunity statute in question is limited by its terms to cases or proceedings "before any grand jury or court of the United States" involving the national security. This would seem to exclude the possibility of granting immunity in connection with the process of registering organizations with the Attorney General. But the fact that new legislation would probably be required to authorize the granting of immunity in connection with registration proceedings does not affect our argument that, because of the possibility of granting immunity, the order is not constitutionally invalid merely because it might not be enforceable without such a grant.

orders and findings determining the character of such organizations, without requiring ^{them} to register (see *supra*, pp. 83-84).

(b) *In any event, the officers of petitioner having the duty under the Act and regulations to effect the registration will not be personally privileged to refuse to do so.*

If the Court should reject our argument that it need not and should not now pass upon the issue of whether an officer of the Party can validly claim the privilege as a ground for not registering the Party, and should desire to determine that issue in this proceeding, our position would be that the privilege is not available to such officers.³⁹ In *United States v. White*, 322 U.S. 694, the Court held not merely that an organization or association cannot invoke the privilege against self-incrimination, but that an officer of an organization or association who has custody of its records, if called upon to produce them pursuant to a subpoena, may not lawfully refuse to do so even if they would tend to incriminate him personally. "[T]he papers and effects which the privilege protects," this Court said, "must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. * * * But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights

³⁹We are not quite sure how such a determination can be made without considerable information about all the particular officers who will be responsible, under the Act and regulations (*supra*, p. 115, fn. 36), for filing petitioner's registration statement. As we have shown above (pp. 114-117), many of petitioner's officers may be unable properly to claim the privilege since *in fact* there is no possibility that the disclosures from their filing the statement will incriminate them.

and duties nor be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." *Id.*, p. 699. See also *Wilson v. United States*, 221 U.S. 361, 376-385; *Wheeler v. United States*, 226 U.S. 478, 489-490; *Essgee Co. v. United States*, 262 U.S. 151, 158; *Curcio v. United States*, 354 U.S. 118, 122-123.

The rationale of the *White* case is equally applicable, we submit, to the case at bar. Cf. Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. of Chi. L. Rev. 687, 720. This Court has, in fact, specifically cited the *White* case as authority for the proposition that one of this very petitioner's officers on the local level—the Treasurer of the Communist Party of Denver—"had no privilege with respect to the books of the Party, whether it be a corporation or an unincorporated association." *Rogers v. United States*, 340 U.S. 367, 371-372.

Nor is the rationale of *White* inapplicable on the ground that in *White* physical records were in question, while the issue here is the compulsory submission

of a registration statement containing the names and addresses of officers and members of petitioner and an accounting of moneys received and expended. For, as the court below said, the data required to be contained in the registration statement "are reproductions of or extracts from organization records" (R. 2094). If the officer of petitioner having custody of its records, showing the names and addresses of its officers and members and the sources and modes of expenditure of its funds, may be required to submit those records pursuant to a subpoena *duces tecum*, notwithstanding his claim that they tend to incriminate him personally, it would be an exaltation of form over substance to hold that he may not be required to transpose such data to a registration form to be filed as required by the Act. Whether the records reflecting the required data "are kept formally or informally is immaterial," as the court below observed, since "[n]o additional explanatory testimony is required by this statute" (R. 2095).

Indeed, there is authority for the view that, to a limited extent, in cases where the compellability of the production of records is established, oral testimony "auxiliary to the production" may also be compelled as long as this testimony does not add substantially to the danger of self-incrimination. See *Curcio v. United States*, 354 U.S. 118, 125. For example, an officer who has been compelled to produce documents which incriminate him may also be required to identify the documents (*Lumber Products Ass'n v. United States*, 144 F. 2d 546, 553 (C.A. 9), reversed on other grounds *sub nom. United Brother-*

hood of Carpenters v. United States, 330 U.S. 395), to testify as to their genuineness (*United States v. Austin-Bagley Corporation*, 31 F. 2d 229, 234 (C.A. 2), certiorari denied, 279 U.S. 863; *United States v. Daisart Sportswear*, 169 F. 2d 856, 861-862 (C.A. 2), reversed on other grounds *sub nom. Smith v. United States*, 337 U.S. 137) or to explain incomplete, illegible, or abbreviated entries (*Fleming v. Silverman*, 7 F.R.D. 29, 31 (N.D. Ill.); cf. *Porter v. Heend*, 6 F.R.D. 588, 589-590 (N.D. Ill.)).⁴⁰

Judge Bazelon, dissenting below, attempted to distinguish the *White* case on the ground, among others, that the officer executing a registration statement is required to do more than produce records of the organization he is registering; that is, he is required to prepare a statement containing data which may or may not be entirely contained in the organization's records (R. 2159-2160). To the extent that any re-

⁴⁰ In *Curcio v. United States*, *supra*, 354 U.S. 118, this Court reversed the contempt conviction of a witness who had refused to testify as to a union's records, of which he was the custodian. The Court, however, distinguished several of the cases cited above (*id.*, p. 125):

"* * * The custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself. The custodian is subjected to little, if any, further danger of incrimination. However, in the instant case, the Government is seeking to compel the custodian to do more than identify documents already produced. * * * Answers to such questions are more than 'auxiliary to the production' of unprivileged corporate or association records."

quired data might not be reflected in the records, he pointed out, the officer is required to rely on his own personal knowledge, and if he has to rely on his own personal knowledge, the information he supplies is to that extent "forced from [his] lips * * *, rather than obtained from the records" (R. 2160). But the argument that, because some of the information called for in a statement required to be filed may be privileged, no statement at all need be filed has been specifically rejected by this Court. See *United States v. Sullivan*, 274 U.S. 259. There, the Court held that the fact that some of the answers called for on an income tax return form may be incriminating does not excuse a failure to file any return at all, the proper course being to file a return and claim the privilege, where the facts warrant, with respect to specific questions. Similarly with respect to a registration statement, even if it be assumed that the registering officer has a privilege with respect to called-for data not found in the organization's records, he would be required to file as complete a statement as possible based on the records, and claim his privilege with respect to the rest.⁴¹

⁴¹ Thus, for example, if the filing official were known by more than one name and he feared that the listing of his aliases would tend to be self-incriminatory for some reason (see R. 2101), he could claim the privilege with respect to his own aliases, though, as the court below indicated (*ibid.*), he could not do so with respect to the aliases of others.

(c) *The validity of the personal registration requirements of Section 8 is not in issue since no individual member of petitioner has been required to register and none is before the Court.*

The court below was obviously correct in holding that the validity of the personal registration requirements of Section 8 of the Act is not presented in this case (R. 2101-2102). As already noted, that section provides, first, that individual members of Communist-action organizations must register personally as members if their organization has been finally ordered to register and fails to do so (Section 8(a)), and, secondly, that if a Communist-action organization registers but fails to include the names of all its members on the membership list it files, the members whose names are omitted must register themselves as members (Section 8(b); see *supra*, pp. 74-75). Section 8 is thus "an alternate, rather than an attachment, to the registration of the organization. As such it poses a separate and independent problem from that posed by the requirement for organization registration. To reach the problem posed under Section 8 we would have to assume that the Party will not register if it is finally ordered to do so, or that if it registers its membership list will be incomplete. But we cannot make such assumptions" (R. 2102). Self-incrimination questions pertaining to the personal registration requirements of Section 8 are thus even more premature than those pertaining to the organizational registration requirements of Section 7. They are

hypothetical questions which may never arise in justiciable form. The Act, moreover, contemplates the institution of proceedings before the Board, culminating in an order, subject to full judicial review, directed to an individual and ordering him to register, as the exclusive means of enforcing Section 8 (see Sections 13 (a), (c), (d), (g)(2), 14 (a), (b), 15(a)(2); and see *supra*, pp. 75, 77). For these reasons, the personal registration provisions of Section 8 are plainly not before the Court. Cf. *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U.S. 419, 443.

3. *The registration provisions are in accord with due process*

Petitioner challenges the registration provisions of the Act as violative of due process in a number of respects (Br. 50-62, 72-95), none of which, we submit, has merit.

(a) *The Act does not predetermine petitioner's liability to registration*

Petitioner first urges (Br. 56-62) that "[t]he Act violates due process because it predetermines facts essential to a finding that petitioner is a Communist-action organization" (Br. 56). Thus, it is claimed, the due process requirement of a hearing is denied. Petitioner's argument, however, is founded on an unwarranted oversimplification of the Act's terms. It seeks to ignore, or unjustifiably to discount, the importance of crucial language in the Section 3(3) definition of a "Communist-action" organization.

(i) Under the definition of Section 3(3), a domestic organization which is not "substantially directed, dominated, or controlled" by the foreign government or foreign organization controlling the world Communist movement, or which does not "operate primarily to advance the objectives" of that movement, is not a "Communist-action organization" and is not subject to the registration and other provisions of the Act, regardless of how "communistic" its philosophy might be, or how deep might be its bounds of sympathy and kinship with the foreign government or organization. Both requirements, it is to be observed, must be fulfilled for the definition to apply. Either alone is insufficient.

It is therefore entirely without warrant to assert, as petitioner does, that the Board had no real function to perform so far as petitioner was concerned, or that it was, and was meant by Congress to be, no more than a "rubber-stamp" designed to place a predetermined label on petitioner. See *Communist Party of the United States v. McGrath*, 96 F. Supp. 47, 50 (Judge Bazelon concurring). That Congress may have confidently believed, on the basis of evidence adduced at Congressional hearings, that petitioner would fall within the definition of Section 3(3) is of no moment so far as the requirements of due process are concerned. Congress supposes in the case of many of the statutes it passes that specific organizations or persons will be subject to their terms. As the court below observed, "A statute is not necessarily null

merely because it fits a known person. Many valid statutes do" (R. 2117).

The important point is that Congress required proof of the two fundamental operative facts, referred to above, by a preponderance of the evidence in proceedings before the Board, and made the Board's findings subject to judicial review, before the obligation to register or any other requirement of the Act could become effective. The Congressional findings as to the existence of a world and an American Communist movement do not make the Act operative against petitioner. Further crucial findings were required to be made, on proof, before that could occur, viz., that petitioner is substantially dominated and controlled by the foreign government or organization controlling the world Communist movement and is operating primarily to advance the objectives of that movement.

The decisions cited by petitioner (Br. 56), of which *Tot v. United States*, 319 U.S. 463, is representative, do not aid petitioner's argument. These cases concern the validity of statutory presumptions under the due process clause. They hold that, in the language of *Tot*, "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience" (*id.*, pp. 467-468). But, as we have just pointed out and as observed by the court below (R. 2120), the Subversive Activities Control Act creates no statutory presumptions in this con-

nction. Rather, the Act provides freely for trial of the two issues, stated above, which were left to the Board. We point out below (*infra*, pp. 139-140) that the eight factors listed in Section 13(e) do not constitute statutory "presumptions."

(ii) Furthermore, due process does not require, as petitioner contends, that the legislative findings of Section 2 be the subject of redetermination in the quasi-judicial proceedings before the Board (Br. 56-61). This argument confuses two sets of facts—the *legislative* facts, or those facts which the legislature itself found after investigation to exist and to require the legislative action taken, and the *adjudicative* facts which, on proof in adversary litigation, bring a specific person or organization within the purview of the legislation, or otherwise make the general terms of the legislation specifically applicable. See McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296, 315-318; Davis, *Official Notice*, 62 Harv. L. Rev. 537, 549-560.

Legislative facts are general conclusions which support the policy of a particular law, and can be attacked only by showing that Congress acted arbitrarily or unreasonably or beyond its delegated powers. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 465-466; *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153. The facts on which the legislature acted can frequently be the subject of judicial notice; in other cases the courts may make inquiry to determine whether there is a reasonable basis for the legislative action. *United States v. Carolene Products Co.*, *supra*, 304 U.S. at 153.

Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209-210; *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-548; see *McCormick, Judicial Notice*, 5 Vand. L. Rev. 296, 316-317. But, at most, the inquiry is as to whether the legislature has acted reasonably.

Here, Congress recorded in Section 2 the basis for its action, the threat to the United States presented by the Communist movement. The existence of that threat and of that movement are recognized facts of modern history. See *supra*, pp. 46-61. Congress cannot be accused of irrationality in taking account of them. Cf. *Barenblatt v. United States*, 360 U.S. 109, 127-129, and the other cases cited *supra*, pp. 96-100. Due process in adversary proceedings, whether before courts or quasi-judicial bodies like the Board, does not require formal proof of these basic facts of which Congress took official notice. The existence of the Communist movement and the fact that it is a threat to this nation's security are, therefore, no more subject to litigation in a particular proceeding under the Act than would be, for example, the fact that much of the world was at war between 1941 and 1945 or that the nation and the world were suffering from severe economic dislocations in the early 1930's.⁴² Cf. *McCormick, Judicial Notice*, 5

⁴² The latter example suggests a hypothetical analogy to the statute at bar. Suppose that Congress, during the depression of the 1930's, passed an act which found as a fact, among other things, that there existed a world-wide economic depression, having certain described characteristics, which was severely affecting the nation's economy. Suppose further that the act established a regulatory agency with the power, under the guidance of appropriate standards, to control or regulate cer-

Vand. L. Rev. 296, 313, 315-318. In short, these legislative findings in Section 2 are "[t]he reasons for the exercise of power" by Congress. *Carlson v. Landon*, 342 U.S. 524, 535. And as this Court said with respect to these very findings, in *Galvan v. Press*, 347 U.S. 522, 529:

On the basis of extensive investigation Congress made many findings, including that in § 2(1) of the [Subversive Activities Control] Act that the "Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship," and made present or former membership in the Communist Party, in and of itself, a ground

tain types of business activity which were found on the basis of evidence to have a substantial tendency to deepen the world and national economic crisis by further depressing interstate and foreign commerce. Could a person or company liable to be affected by an order of such an agency demand the right to seek to prove before it that there was no world-wide economic depression of the type described in the Congressional findings? Or that, if there was, it was not affecting the domestic economy in the manner found by Congress? We submit that there is nothing in any valid concept of due process which could properly be construed to require that every person or company involved in a proceeding before such an agency be granted a hearing in which to attempt to convince it that these basic legislative findings of Congress were erroneous. This is so, we maintain, notwithstanding that the adjudicative findings of the agency would assume the facts incorporated in the legislative findings in precisely the same sense in which the adjudicative findings of the Board in this case assume the facts stated in the legislative findings of Section 2 of the Act.

for deportation. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

(iii) The fact that Section 4 of the Communist Control Act of 1954 refers to petitioner by name as a "Communist-action" organization under the Subversive Activities Control Act (see Pet. Br. 62) does not aid petitioner's basic contention on this point. Since the Communist Control Act was passed long after the termination of the original proceedings before the Board, it is evident that that Act's designation of petitioner by name could not have influenced the Board's original findings. At most, it amounted to Congressional approval of and concurrence in the Board's decision. And the Board's re-affirmation of the earlier findings in its Modified Report did not even consider the characterization of petitioner in the Communist Control Act. Instead, that decision, as we have pointed out (*supra*, pp. 128-130), was required to be based—and was in fact entirely based (see *infra*, pp. 212-221)—upon judicially reviewable proof that petitioner came within the Section 3(3) definition of a Communist-action organization.

(b) *The Act does not establish a Board which is "necessarily biased" against petitioner*

Related to the previous contention is petitioner's further argument (Br. 74-79) that "[t]he Act violates due process by establishing a Board which is necessarily biased and has an interest in the event" (Br.

74) because to sustain its *raison d'être* it would have to find the Communist Party to be within the Act. What petitioner in effect is charging is that the structure and scheme of the Act are such that it would be impossible to staff the Board with members who would not enter upon their duties with the intention of violating their oaths of office. This Court has refused to impute, on the theory of constructive bias, a dishonest or interested point of view to government employees sitting as jurors in cases to which the Government is a party (*Frazier v. United States*, 335 U.S. 497; *United States v. Wood*, 299 U.S. 123), including criminal prosecutions of admitted Communists of high position (*Dennis v. United States*, 339 U.S. 162). There is no more reason to believe members of the Board would violate their oaths in a proceeding under this Act by determining to find petitioner registerable as a Communist-action organization, irrespective of the Act's definition of the term and regardless of what the evidence might show.

This Court has said, "We cannot agree that courts should assume in advance that an administrative hearing may not be fairly conducted." *Fahey v. Mallonee*, 332 U.S. 245, 256; see also *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 700-703; *National Labor Relations Board v. Air Associates*, 121 F.2d 586 (C.A. 2). This is especially true where full opportunity for judicial review is afforded by the Act (see *Fahey v. Mallonee*, *supra*, 332 U.S. at 256; *Marquette Cement Mfg. Co. v. Federal Trade Com-*

mission, 147 F. 2d 589, 594 (C.A. 7)), and even more particularly where, as here, the standard of review is the strict "preponderance of the evidence" standard (see R. 2126; *infra*, p. 137, fn. 43). A full and fair hearing was in fact afforded in this case, and the Board's findings (except one (see *infra*, pp. 276-283)) and conclusions were upheld by the court of appeals as sustained by the preponderance of the evidence. The court below is surely not subject to the charges made against the Board.

Nor do we believe that petitioner's allegations (Br. 78) as to bias in two particular members of the Board are nearly sufficient to disqualify them. In any case, neither of them participated in the Modified Report or the Modified Report on Second Remand which is the subject of this review. Thus, these allegations have no present relevancy.

(c) *The Act does not authorize a determination that an organization is a Communist-action organization on the basis of irrational or vague criteria or presumptions*

Petitioner next contends (Br. 79-88) that "[t]he Act violates due process because of its vague and irrational standards" as to what constitutes a Communist-action organization (Br. 79).

(i) *The standards laid down by Congress in Sections 3(3) and 2 provide a sufficiently clear delegation of power.*

In its original brief in this Court, petitioner conceded that "the ultimate standards established by section 3(3) are definite and meaningful" (1955 Br. 53). At present, however, it contends that, while the control component of Section 3(3) is a "reasonably

definite and meaningful standard," the objectives component is "vague" (Br. 85). Petitioner points out that Section 3(3) defines a Communist-action organization as under foreign control and as operating "primarily to advance the objectives of [the] world Communist movement as referred to in section 2" and argues that "section 2 is thoroughly ambiguous and vague as to the nature of these objectives" (Br. 79; see Br. 30-31). Since petitioner failed to make this claim when it was first before the Court—and in fact conceded the contrary—it cannot resurrect the claim after the remand (see *infra*, pp. 283-287).

In any event, Section 2 spells out in considerable detail the objectives of the world Communist movement. Thus, it states that the movement's "purpose * * * is, by treachery, deceit, infiltration * * *, espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship * * * throughout the world" (Section 2(1)). Section 2 (2) and (3) then describes a "totalitarian dictatorship":

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties * * *, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the

existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

We submit that the standards of Sections 3 (3) and 2 are sufficiently clear. First, it is important that the Board's findings are subject to judicial review by the court of appeals. Since the Board's determinations are conclusive only if supported by the preponderance of the evidence (Section 14(a)), the reviewing court has considerably broader powers than is usual in considering determinations of administrative agencies.⁴³ Thus, the Board's discretion under the standards laid down by Congress is far from unfettered. See *Carlson v. Landon*, 342 U.S. 524, 543; *American Power Co. v. Securities and Exchange Commission*, 329 U.S. 90, 105-106.

Second, this Court has allowed Congress great latitude in delegating power to administrative agencies on the basis of standards more general and undefined than that involved here. In *American Power Co. v. Securities and Exchange Commission*, *supra*, 329 U.S. at 104-105, the Court held constitutional a provision giving the Commission power to insure that the corporate structure of a holding company system does not "unduly or unnecessarily complicate the structure" or "unfairly or inequitably distribute voting power

⁴³ The usual rule is that the finding of the administrative agency, if "supported by substantial evidence" shall be final. See Administrative Procedure Act, Section 10(e), 5 U.S.C. 1009(e)(5); National Labor Relations Act, as amended, 29 U.S.C. 160(e).

among security holders." The Court stated (*id.*, p. 105):

The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. * * *

Similarly, in *Sunshine Coal Co. v. Adkins*, 340 U.S. 381, 399-400, the Court said:

The fact that many instances may occur where its [the definition of bituminous coal] application may be difficult is merely to emphasize the nature of the administrative problem and the reason for the grant of latitude by the Congress. The difficulty or impossibility of drawing a statutory line is one of the reasons for supplying merely a statutory guide. * * * That guide is sufficiently precise for an intelligent determination of the ultimate questions of fact by experts.

While the requirements for delegation of power outside the area of economic regulation may perhaps be stricter, nevertheless these same basic considera-

tions apply." In this Act, Congress set forth a description of the objectives of the world Communist movement in much greater detail than is usual in a statutory delegation of power. We submit that greater specificity would have been almost impossible. Certainly, the standard here was "sufficiently precise for an intelligent determination of the ultimate questions of fact by experts."

(ii) *The items in Section 13(e), are relevant evidentiary considerations and are plainly rational.*

a. At the heart of petitioner's contention that the standards of Section 13(e) are vague and irrational, vitiating it in all its ramifications, is its fundamentally erroneous view (see Br. 80, 81, 82, 83) that the eight factors itemized in Section 13(e) are "tests" of whether a given organization is a Communist-action organization. Section 13(e), however, merely requires the Board to "take into consideration" the eight evidentiary matters or factors which it lists "in determining whether any organization is a 'Communist-action organization'." Thus, Congress provided no

¹ Cf. *Mahler v. Eby*, 264 U.S. 32, 40, where the court upheld delegation of authority to the Attorney General to deport aliens who are "undesirable residents of the United States"; *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178; 189-192, upholding the constitutionality of a statute allowing the Postmaster General to return mail to the senders which is addressed to persons the Postmaster General finds are using the mails to obtain money "by means of false and fraudulent pretenses, representations, and promises" (*id.*, p. 180).

such collection of litmus tests as petitioner supposes. The items listed in Section 13(e) are simply relevant considerations or guides to the consideration of evidence bearing upon the question whether an organization is a Communist-action organization. The sole and exclusive "test" is that supplied by the definition of such an organization in Section 3(3), *viz.*, whether it is substantially directed, dominated, or controlled by the foreign government or organization controlling the world Communist movement *and* operates primarily to advance the objectives of that movement as referred to in Section 2. Yet, if petitioner were right in its reading of the items in Section 13(e), the definition in Section 3(3) would serve no purpose at all.

As the court below aptly phrased it (R. 2120), Section 13(e) is merely a "catalog of some basic considerations" bearing on that ultimate issue, and the listed items are in no sense exclusive. "Nothing in the statute hints at an exclusive criterion. The Board should, and so far as we can tell did, admit and consider whatever is competent, relevant and material" (R. 2119).⁴⁵

⁴⁵ In this respect, the Act is comparable to many other federal statutes which set forth guides to administrators, guides which are not separate "test" but factors to be considered. See, *e.g.*, *Hampton & Co. v. United States*, 276 U.S. 394; *Mulford v. Smith*, 307 U.S. 38; *Sunshine Coal Co. v. Adkins*, 310 U.S. 381; *Opp Cotton Mills v. Administrator*, 312 U.S. 126; *Yakus v. United States*, 321 U.S. 414; *American Power Co. v. Securities and Exchange Commission*, 329 U.S. 90; *Fahey v. Mallonee*, 332 U.S. 245; *Lichter v. United States*, 334 U.S. 742. See also *infra*, pp. 153-156.

b. When the function to be served by the Section 13(e) evidentiary considerations is properly understood, they are not, as petitioner contends, irrational. On the contrary, they are all both rational and probative. While we believe this to be evident from a mere reading of the items, we shall take them up *seriatim* and examine each in the light of the particular criticism leveled by petitioner.

The "directives and policies" consideration (Section 13(e)(1)).—Section 13(e)(1) requires the Board to take into consideration—

(1) the extent to which its [the organization's] policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 * * *.

This goes directly to the nature of the relationship existing between the organization and the foreign government or organization controlling the world Communist movement, which is the primary focus of the Act. Petitioner contends, however, that Section 13(e)(1) does not require the Board to consider "whether the organization seeks to establish a 'Communist totalitarian dictatorship' * * * much less to use * * * unlawful means" but only whether it "seeks to effectuate Soviet policies on *any* subjects" (Br. 79).

This argument distorts the language of Section 13(e)(1). Section 13(e)(1) does not say that the

Board is to consider the extent to which the organization's policies are formulated and carried out, and its activities performed, to effectuate "any" policies of the foreign government which controls the world Communist movement. The word used is "the," which refers to the policies of the foreign government as a whole. These would certainly include at least those major objectives referred to in Section 2 as presenting a clear and present danger to the security of the United States, *i.e.*, the establishment of Communist totalitarian dictatorships in the countries throughout the world and the forcible overthrow of this Government (see, particularly, Section 2 (1) and (15)), as well as any "good" objectives—objectives which might be shared by and benefit the United States—which could incidentally, as tactical or intermediate ends, accompany the major goals. As the court below remarked (R. 2121)—

The crucial factor in the statute before us is the aim, spelled out in detail, of the world Communist movement to disestablish our system of government. Our Government may well oppose the establishment in this country of a totalitarian dictatorship of the sort described in the definition, even if such a dictatorship does not meet the definition of "evil" [*i.e.*, having "immediate objectives" which are "morally wrong" (see *ibid.*)] or even if it has many beneficent features.

Thus, contrary to petitioner's claim, Section 13(e) (1), fairly read, does direct the Board to consider evidence that the accused organization is engaged in pro-

moting the disestablishment of our system of government. Furthermore, as we have pointed out (*supra*, pp. 128-130), the Section 3(3) definition of a "Communist-action" organization requires that the Board must in any event be satisfied from all the evidence that the organization before it, besides being controlled by the foreign government or organization controlling the world Communist movement, operates primarily to advance the objectives of that movement "as referred to in section 2." The objectives of the world Communist movement "as referred to in section 2" (see *supra*, pp. 136-137) are precisely those objectives which petitioner contends, erroneously, are not required to be considered.

The "non-deviation" consideration (Section 13(e) (2)).—Section 13(e) (2) requires the Board to take into consideration—

(2) the extent to which its [the organization's] views and policies do not deviate from those of such foreign government or foreign organization [*i.e.*, the foreign government or organization which controls the world Communist movement].

The court below not only held that the "non-deviation" inquiry is a proper one to be made in determining the question of foreign control, but observed that it would be "difficult to conceive of a more proper" one (R. 2121). "In an inquiry as to the domination of one organization by another," said the court, "the extent of the deviation one from the other in views and policies is both relevant and material; indeed it would be one of the necessary considerations" (*ibid.*).

Non-deviation, in short, may not be conclusive, but it is plainly relevant.

Petitioner mistakes the meaning and purpose of this factor when it contends that "[u]nder this obscurantist test, the stigma of foreign control and sedition can be avoided only by adopting views which are demonstrably false if the Soviet Union has adopted views which are demonstrably true" (Br. 80). The fact that a local organization mirrors in each facet of its activities through many years the policies of a foreign state is surely pertinent to proof of its control by that state. See Sutherland, *Freedom and Internal Security* (1951), 64 Harv. L. Rev. 383, 401. That every act of A and B are undeviatingly identical does not, of itself, prove that A controls B; the possibility remains that B controls A, or that each is controlled by C, or that it is simply a matter of extraordinary coincidence. But the fact is certainly relevant to the inquiry. Cf. *North American Co. v. Securities and Exchange Commission*, 327 U.S. 686, 692, where this Court observed that, in determining whether one company was subject to the controlling influence of another, the Securities and Exchange Commission was "warranted in considering the harmonization of local policies."

The "financial aid" consideration (Section 13(e) (3)).—Section 13(e) (3) requires the Board to take into consideration—

(3) the extent to which it [the organization] receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization [i.e.,

the foreign government or organization which controls the world Communist movement].

Petitioner attacks this evidentiary factor on the ground that foreign financial aid to a local organization does not, *in and of itself*, prove domination and control (Br. 81). Of course it does not. But foreign financial support is a pertinent factor which may reasonably be considered with other evidence as tending to show control by the foreign donor. In the ordinary course of events a foreign power does not contribute funds to a local organization as a bare gratuity, without expectation of some benefit.

Petitioner argues that in such cases "the relevant consideration is not the bare fact of aid, but the terms and conditions, if any, on which it is given" (Br. 81). But as observed by the court below, while "the terms of a contribution are more, even much more, material to the issue of intended influence by means of the gift," nevertheless "the bare fact of the gift is not irrelevant" (R. 2123). While "it may be explained away, as may any of the statutory specifications of considerations" listed in Section 13(e), "the fact of the gift is certainly an admissible item of proof" (*ibid.*).

The "instruction and training" consideration (Section 13(e)(4)).—Section 13(e)(4) requires the Board to take into consideration—

(4) the extent to which it [the organization] sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement.

Viewed as a factor to be weighed, this consideration is surely pertinent. True, the sending of one representative to one foreign conference might have little or no meaning. On the other hand, a local organization's continuous course of regularly sending representatives for specialized training in the strategy and tactics of world Communism, which is subsequently used for carrying out directions in this country, could be highly significant. Petitioner nevertheless contends that this factor "is irrational because it does not require a showing that the accused organization is obliged to or does conform to what is taught" (Br. 81). As remarked by the court below, however, the question at this point is not whether the Board could legitimately "make an ultimate finding of foreign domination upon the basis of bare evidence that [petitioner] sent agents abroad" (R. 2123), but the propriety of considering such evidence as part of a total picture.

The "reporting" consideration (Section 13(e) (5)).—Section 13(e) (5) requires the Board to take into consideration—

- (5) the extent to which it [the organization] reports to such foreign government or foreign organization [i.e., the foreign government or organization which controls the world Communist movement] or to its representatives.

Here, too, it is the context in which the reporting is done—the entire factual background against which the reporting occurs—which gives meaning and significance to the act of making reports. A report may be made, as petitioner says (Br. 82), under circum-

stances which suggest nothing in the way of domination or control. On the other hand, such surrounding circumstances as the length of time the reporting goes on, the frequency of its occurrence, the conditions of secrecy under which it is carried out, the contents of the reports, the reasons therefor, and all the other background data might very well indicate a definite degree of domination and control, or even that the reporting party is an agent of the party reported to. The fact of reporting is consequently a legitimate evidentiary consideration whose significance is to be appraised in the light of the evidence as a whole.

The "discipline" consideration (Section 13(e)(6)).—Section 13(e)(6) requires the Board to take into consideration—

(6) the extent to which its [the organization's] principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization [i.e., the foreign government or organization which controls the world Communist movement] or its representatives.

If, as in the hypothetical case petitioner poses (Br. 82), the evidence should show that only a relatively few of the organization's leaders or an unimportant minority of its members are subject to foreign disciplinary power, that fact would, of course, tend to discount the significance of this factor in the total picture which emerges from the evidence as a whole. But the possibility of that result does not negate the propriety of the inquiry, which is into "the extent to which" the

organization's leaders and members are under foreign discipline. As with all the other evidentiary considerations contained in Section 13(e), it is the *degree* to which the particular evidential factor appertains that the Board is directed to consider. If the evidence is equivocal or insignificant with respect to a given item of inquiry, the record will so show. It cannot merely be assumed that Congress intended the Board to be governed—or that the Board was governed—by trivial evidence or evidence having no real probative force with respect to the ultimate issue.

The "secret practices" consideration (Section 13(e) (7)).—Section 13(e) (7) requires the Board to take into consideration—

(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it [the organization] fails to disclose, or resists efforts to obtain information as to its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis.

Petitioner contends that this "test" is irrational because it makes "secret practices" relevant (Br. 83)—

* * * only if employed for the purpose of concealing foreign control or promoting the organization's objectives. The first of these pur-

pose limitations involves circular reasoning, since foreign control is one of the ultimate facts to be established under section 3(3). Obviously, a standard whose application requires proof of an ultimate fact cannot be used to determine the existence of the ultimate fact.

This argument, however, overlooks the fact that the "purpose" clause of Section 13(e)(7) is not limited to "the purpose of concealing foreign direction, domination or control." It is cast in the disjunctive: "... or of expediting or promoting its [the organization's] objectives." Thus, so far as the language of Section 13(e)(7) is concerned, the purpose of the secret practices need not be directly concerned with "concealing foreign direction, domination, or control" in order to be considered by the Board. Petitioner's contention that Section 13(e)(7) necessarily involves circular reasoning is therefore untenable.⁴

"Petitioner also attempts to build a "circuitry" argument on the second part of the "purpose" clause of Section 13(e)(7), viz, "for the purpose of * * * expediting or promoting its objectives." Relating this to the second element of the definition of a Communist-action organization—the requirement that the organization in question "operate primarily to advance the objectives of such world Communist movement * * *" (see Section 3(3))—petitioner, in the same manner as it argued in the passage quoted in the text, *supra*, contends that the secrecy test cannot come into play until the ultimate fact that "secret practices" is supposed to establish has first been independently proved (Br. 83). This branch of petitioner's argument, however, is as invalid as the other, and for the same reason—that the two parts of the "purpose" clause of Section 13(e)(7) are in the disjunctive.

Once again we must stress—because petitioner repeatedly ignores it—that this is but one of several factors to be taken into account and is not determinative in itself. An organization's habit of operating on a basis of secrecy, for either of the purposes referred to in Section 13(e)(7), is obviously a pertinent factor to be considered in determining whether it meets the Section 3(3) definition of a Communist-action organization, along with such evidence as the calculated avoidance of previous registration acts, illegal activities of its leaders, and domination and control by a foreign government. Cf. *American Power Co. v. Securities and Exchange Commission*, 329 U.S. 90, 104.

The “allegiance” consideration (Section 13(e)(8)).—Section 13(e)(8) requires the Board to take into consideration—

(8) the extent to which its [the organization's] principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization [i.e., the foreign government or organization which controls the world Communist movement].

Petitioner criticizes this “test” on several grounds (Br. 83–84). First, it says, it is “completely subjective. It directs an inquiry into a pure state of mind” (Br. 83). Of course, allegiance is ultimately a matter of mental attitude. But this is determinable from objective facts. Inquiry into states of mind—

for example, the intent underlying a particular action—is a common legal function.

Secondly, says petitioner, the paragraph in question “assumes the facts prerequisite to the state of mind into which the Board is to inquire” (Br. 83). It does not, according to the argument, direct the Board to determine *whether* any of the organization’s leaders or members owe obligations to the foreign government or organization but assumes that some leaders and members do owe such obligations and confines the Board’s inquiry to whether they consider those obligations subordinate to their allegiance to the United States (Br. 83–84). This argument is little more than a quibble. It could as well be argued that the paragraph assumes—what might be contrary to the facts—that all of the leaders and members of the organization consider that they owe at least some degree of allegiance to the United States. Properly construed, the paragraph simply means that the Board should take into consideration the extent to which the organization’s principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to such obligations as they *may* have or feel they have to the foreign government or organization which controls the world Communist movement.

Thirdly, petitioner urges that the paragraph “imputes to the organization the state of mind of its ‘principal leaders or a substantial number of its members’ although they may be an unrepresentative or dissenting minority and though the organization

itself is completely loyal" (Br. 84). This is the same attack which petitioner makes against the "discipline" consideration of Section 13(e)(6) and our reply to that criticism (*supra*, pp. 147-148) is also applicable here. The essential point, once again, is that this factor, like all the other factors listed in Section 13(e), presents a pertinent evidentiary consideration and is in no sense a controlling criterion.

The "allegiance" consideration, far from being irrational, is one of the most relevant and cogent factors. The character of an organization is always colored by the viewpoint of its leadership. When that viewpoint is shared by substantial segments of its other members, it may very well stamp the organization with an indelible character. If a significant number of the leaders and members of a certain group feel they owe a higher allegiance to a foreign country (or to an organization or movement controlled by that country) than to their own, that fact is incontestably one indication of the group's character. This factor becomes even more obviously relevant when applied to an autocratic organization dominated and inflexibly disciplined by a central ruling clique from the top down.

If the leaders and significant numbers of the membership pay fealty to the foreign government or organization over the years while manifesting hostility to every move of their own government; if they heap praise on the foreign government while consistently castigating their own; if internally they reflect as a group the thinking and the attitude of that foreign

government to the point of actual identity while disassociating themselves from that of their homeland—such evidence is a legitimate and potent factor, to be evaluated in the light of all the other evidence, in determining the ultimate issue presented by Section 3(3)."

c. After attacking each of the considerations separately, petitioner further contends (Br. 84-88) that Section 13(e) is invalid, as a whole, because it is so vague that decision is left to the Board's unfettered discretion. "The Act nowhere indicates whether a registration order must be supported by adverse findings under all eight standards, or whether something less is sufficient" (Br. 84). Furthermore, it is argued, "[t]he obscurity which thus envelops section 13(e) is made even more impenetrable by the phrase 'the extent to which,' which prefaces each of the eight standards" (Br. 84).

The only "standard", however, by which the validity of the Act must be judged is the ultimate standard of Section 3(3), containing the definition of a Communist-action organization. As we have shown (pp. 135-139), this test is " * * * sufficiently precise for an intelligent determination of the ultimate questions of fact by experts." *Sunshine Coal Co. v. Adkins*, 310

"Related to and overlapping petitioner's argument that the considerations listed in Section 13(e) are irrational is its argument (Br. 85-86) that the subsection is based upon irrational presumptions. As our discussion of the eight considerations shows (*supra*, pp. 139-153), they are plainly not "presumptions" of any kind, *prima facie* or conclusive, but factors to be weighed—akin to the many similar lists in other federal legislation providing for administrative rulings—and they are certainly not unreasonable.

U.S. 381, 400. This sufficiency is not diluted by the fact that Congress, in addition to formulating the final criterion, directed the Board to "take into consideration" "the extent to which" certain factors were true with respect to a given organization in determining whether it came within Section 3(3). Congress did not tell the Board, as petitioner apparently suggests it should have, what relative weight it should give to each of the factors mentioned, or advise it as to what "extent" each factor should be present to have significance, or how much significance it should have. But no such attempt to affix apothecaries' weights to abstract concepts would have been possible even if desirable. The Constitution "is not to be interpreted as demanding the impossible or the impracticable." *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 145. This Court's decisions make clear that there is no defect in Congress' directive to the Board to "take into consideration" "the extent to which" the factors mentioned are true or applicable in a given case.

In *Hampton & Co. v. United States*, 276 U.S. 394, the Court upheld a congressional direction to the President, in adjusting tariffs, to "take into consideration," "in so far as he finds it practicable," a variety of economic matters—including the catch-all "any other advantages or disadvantages in competition" (*id.*, p. 401-402). In *Mulford v. Smith*, 307 U.S. 38, 48-49, the direction in the Agricultural Adjustment Act of 1938 to the Secretary of Agriculture that, in allotting marketing quotas among states and pro-

ducers, he give "due consideration" to a variety of economic factors (*id.*, p. 43) was sustained. *Opp Cotton Mills v. Administrator*, *supra*, 312 U.S. at 142-146, upheld the requirement in the Fair Labor Standards Act of 1938 that, in fixing minimum wage rates, the Wages and Hours Administrator "consider among other relevant factors" certain itemized economic considerations (*id.*, p. 136). And in *Yakus v. United States*, 321 U.S. 414, 423-427, the Court sustained the directive to the Price Administrator, in establishing maximum prices on commodities, to "ascertain and give due consideration to," "so far as practicable," prices prevailing during a designated base period, and to "make adjustments for such relevant factors as he may determine and deem to be of general applicability, including" certain economic factors (*id.*, p. 421).^{*}

The *Opp Cotton Mills* case, *supra*, is particularly pertinent. "It is urged," said the Court, "that the statute does not prescribe the relative weight to be given to the specified factors or the other unnamed 'relevant factors.' It is said that this * * * leave[s] the function which the committee and Administrator are to perform so vague and indefinite as to be practically without any Congressional guide or control" (312 U.S. at 143-144). Rejecting this argument, the Court said (*id.*, pp. 145-146):

^{*} See also *American Power Co. v. Securities and Exchange Commission*, 329 U.S. 90, 104-106; *Bowles v. Willingham*, 321 U.S. 503, 512-516; *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 397-399; *Field v. Clark*, 143 U.S. 649, 680-694.

* * * The fact that Congress accepts the administrative judgment as to the relative weights to be given to these factors in each case when that judgment in other respects is arrived at in the manner prescribed by the statute, instead of attempting the impossible by prescribing their relative weight in advance for all cases, is no more an abandonment of the legislative function than when Congress accepts and acts legislatively upon the advice of experts as to social or economic conditions without reexamining for itself the data upon which that advice is based.

The same view was expressed in *Bowles v. Willingham*, 321 U.S. 503, 516.⁴⁰

(d) *The Act does not deny a judicial trial in criminal prosecutions for failure to register by making the Board's determinations of fact conclusive*

Petitioner argues (Br. 72-74) as follows: After the Board's determination that an organization is a Communist-action organization becomes final, the organization and its officers may be criminally prosecuted for failure to register (and its members may be prosecuted for failure to register themselves, applying for passports, etc.); the fact that the organization is a Communist-action organization is a necessary

⁴⁰ " * * * The fact that there is a zone for the exercise of discretion by the the Administrator is no more fatal here than in other situations where Congress has prescribed the general standard and has left to an administrative agency the determination of the precise situations to which the provisions of the Act will be applied and the weight to be accorded various statutory criteria on given facts."

element in these prosecutions; nevertheless, the Board's determination of this fact is conclusive and cannot be relitigated in the criminal trial. These contentions are without merit for several reasons.

(i) Petitioner, having failed to make this contention either in the court of appeals or this Court on the original appeal, cannot raise the issue for the first time on remand (see *infra*, pp. 283-287).

(ii) This contention is of course premature at the present time; not even the stage for preparing and filing a registration statement has been reached (see *supra*, pp. 107-108, 126-127). Since the present case does not involve a criminal prosecution in any sense, this is not the proper time for defining the constitutionality of prosecutions which may perhaps later occur.

(iii) Even if petitioner's claim were not premature, it cannot help petitioner in this case. For assuming, *arguendo*, that petitioner is correct, the effect of its argument is merely to ensure a defendant in the consequent criminal prosecution the opportunity to retry the question whether a particular organization is a "Communist-action organization" under the Act. Certainly, such a defendant cannot claim that his constitutional right to a fair judicial trial is violated merely because the Board has decided for administrative purposes that an organization is a "Communist-action organization" if no use of this determination is made at the criminal trial.

Assuming *arguendo* that no use of the Board's determination could be made in a subsequent trial, it

would not be a mere meaningless and gratuitous proceeding. The Board's determinations have considerable importance apart from their effect in any criminal prosecution. First, the organization, its officers, or its members may obey the order of the Board requiring registration. Second, even if no registration ever occurs, Congress intended the Board to determine, on the basis of quasi-judicial proceedings, those organizations which are "Communist-action organizations" and make this determination known to the public (see *supra*, pp. 120-121). And, third, the Act prohibits officers or employees of the United States or of any defense facility from hiring members of such organizations and prohibits officers or employees of the United States from issuing such persons passports—prohibitions which they will presumably comply with even if they cannot be introduced in any criminal prosecution (Sections 5(a)(2)(B), 6(b)).

(iv) In any event, petitioner's contention is on its merits without substance. As we have seen (*supra*, pp. 135-139), Congress validly delegated the power to determine Communist-action organizations to an administrative agency. Congress has decided that this determination should have several effects on the organization, its officers, and members such as requiring registration, forbidding application for passports, etc. If the organization or individuals subsequent to the administrative determination fail to conform with these effects of the determination prescribed by Congress, they are guilty of a criminal offense.

This statutory schema in effect punishes failure to obey an administrative determination (which is reviewable in the courts). For example, Section 15(a) prescribes a criminal offense for any organization or individual, "[i]f there is in effect with respect to any organization or individual a final order of the Board requiring registration" and the organization or individual has failed to register. Similarly, Section 6 declares that it is unlawful for any member of an organization which is registered under the Act or as to which "there is in effect a final order of the Board requiring such organization to register" to apply for or use a passport with knowledge of the registration or final order. See also Sections 5(a), 10 (*supra*, pp. 78, 79-80, 81). Thus, the only issues in the criminal prosecution are whether a final administrative determination is outstanding, or the organization has registered, and whether the defendant has failed to obey the consequences Congress has proscribed for those actions; the correctness of the administrative determination is not material.

The law is replete with instances in which a status or duty is established administratively, to be followed by criminal consequences in the event of subsequent acts or omissions by the person affected. Such legislation is not to be invalidated upon the theory that the crimes peculiarly associated with the specific status or duties may later indirectly rest upon the original administrative determination of that status. Thus, a person denied a driver's license could not lawfully take it into his own hands to drive

without a license because the denial was by an administrative body.

A significant analogy is found in the selective service legislation. The hundreds of thousands of draft classifications have not been established by jury trials; yet refusals to comply with requirements of the classifications have been made crimes by statute, and the validity of the legislation has been upheld. As observed by this Court in *Cox v. United States*, 332 U.S. 442, 453:

The concept of a jury passing independently on an issue previously determined by an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order. * * *

Freight tariffs and price controls established by administrative proceedings have also long been upheld. In *Yakus v. United States*, 321 U.S. 414, 444-445, this Court stated:

* * * [W]e are pointed to no principle of law or provision of the Constitution which * * * precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U.S.C. §§ 6 (7), 10 (1); *Armour Packing Co. v. United States*, 209 U.S. 56, 81; *United States v. Adams Express Co.*, 229 U.S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution. [Citing decisions.]

Similarly, in contempt proceedings based on refusal to obey a preliminary injunction, this Court has held that, even if the injunction was incorrectly issued, "we would * * * affirm the judgment for criminal contempt as validly punishing violation of an order then outstanding and unreversed." *United States v. United Mine Workers*, 330 U.S. 258, 289-295. While the injunction was issued by a court, it was not even based on full litigation of the merits of the complaint. Similarly, a person charged with refusing to obey a court of appeals' enforcement order of a determination by the National Labor Relations Board certainly could not claim the opportunity to relitigate judicially the administrative determination which the court of ap-

peals had previously found was supported by substantial evidence.

Although contempt cases are not, strictly speaking, criminal prosecutions, persons charged with contempt are of course just as entitled to a fair judicial trial of all the relevant issues. In addition, it would be anomalous for the Constitution to require the relitigation of the Board's determination in criminal prosecutions based on such a determination, but not to require relitigation if the statute had merely provided for judicial enforcement of the Board's order. There could hardly be a constitutional difference if Congress had decided to allow the court of appeals to enforce the Board's determination (based on the same preponderance-of-the-evidence standard of review) by ordering the organization (and, in lieu thereof, its officers and members) to register and its members not to apply for a passport, etc. The fact that Congress has given the organization, its officers, and members the benefit of a full criminal trial (including the guarantees of indictment and trial by jury) when charged with failure to obey the Board's final orders and its statutory consequences can hardly produce, as a constitutionally required result, the right to relitigate the administrative determination itself.

If a defendant could collaterally relitigate the correctness of an administrative order, the result would be to interfere seriously with Congress' power to delegate authority to an administrative agency. Any person could flout the administrative determination

knowing that the order could be relitigated. The only risk would be that the relitigation would result in the same determination as the agency had previously made, thereby subjecting the defendant to criminal penalties. Thus, the determination would serve only as notice to the public of the facts found and to the organization, its officers, and members that they faced criminal prosecution if they did or failed to do certain things. Since all issues of enforcement would be determined by the courts for themselves *de novo*, effective regulatory power would be transferred from the administrative agency, where Congress placed it, to the courts.⁶⁰

In sum, we submit that any organization or individual charged with an offense under the Act is in effect charged with failure to obey a final order of the Board, as read in the light of the effects prescribed by Congress. This order may be challenged only in the manner Congress has provided—that is, by applying for review in the court of appeals and ultimately this Court. The defendant in a criminal

⁶⁰ *Wong Wing v. United States*, 163 U.S. 228, on which petitioner relies (Br. 72-73), is clearly inapposite. There, this Court held unconstitutional, under the Fifth and Sixth Amendments, a statute providing for trial by a justice, judge, or commissioner of Chinese aliens for being unlawfully in the United States. Thus, the case was never to reach a court. Here, in contrast, any defendant is given the full protection afforded in any criminal prosecution including an indictment and trial by jury on all relevant issues—that is, whether he has violated the consequences established by Congress for an administrative order.

prosecution, however, can litigate only the issues of whether he has obeyed the order and what are its statutory consequences; he has no right to a *de novo* judicial determination of the order itself.⁵¹

(e) *The Communist Control Act of 1954 does not make it impossible for petitioner to know who its members are*

Petitioner's next challenge (Br. 88-95) to the registration provisions as violative of due process is based on its reading of those provisions in the light of Section 5 of the Communist Control Act of 1954, c. 886, 68 Stat. 776. The argument runs as follows: if the order of the Board becomes final, petitioner and its officers will be required to list the names of all its members in its registration statement, and "other persons" will have to "determine whether they are members" in order to know whether they are subject to the Act's sanctions and whether they must personally register in the event of petitioner's default. But the criteria for determining membership, in Section 5 of the Communist Control Act, are so "vague and irrational," the argument concludes, that it is impossible for any one to know whether or not anybody, including himself, is a member, with the alleged consequence that the registration requirements of the Act, considered in the

⁵¹ Petitioner suggests (Br. 74) that "a Board determination cannot be binding in a criminal prosecution of one of the organization's members because the member was not a party to the Board proceeding. However, the organization represents all its members in proceedings as to the character of the organization (see *infra*, p. 208).

light of Section 5 of the Communist Control Act, are void for indefiniteness (Br. 89).⁵²

(i) For reasons similar to those set forth *supra*, pp. 107-108, 126-127, this contention is premature since the stage of preparing and filing a registration statement has not yet been reached, and the Board's findings and order are valid even though some of the officers of petitioner who will have the duty to effect its registration may have good reasons for not complying with the order, or not complying fully.

(ii) In any event, the argument is unsound. As with the considerations set forth in Section 13(e)

"Section 5 provides that—

"In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, *the jury, under instructions from the court*, shall consider evidence, if presented, as to whether the *accused person*:
* * * " (Emphasis added.)

This is followed by thirteen numbered paragraphs, of which it will suffice here to quote the first few as examples:

"(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

"(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

"(3) Has made himself subject to the discipline of the organization in any form whatsoever;

"(4) Has executed orders, plans, or directives of any kind of the organization;

A fourteenth and final paragraph provides:

"(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated."

(*supra*, pp. 139-140), petitioner erroneously attempts to depict Section 5 of the Communist Control Act as a collection of "tests" of membership. But the language of Section 5 makes it absolutely clear that its purpose is merely to list items of evidence to be considered in reaching the ultimate factual conclusion of knowing membership. It states that in determining membership, etc., the jury "shall consider evidence * * * as to whether * * *," etc. And subsection (14) provides that the enumeration of the "above subjects of evidence" shall not limit the inquiry into and consideration of "any other subject of evidence" on membership, etc. See *supra*, p. 165, fn. 52. Each of the evidentiary items listed is plainly a relevant consideration even though it may not itself be determinative. The whole section makes sense when it is realized that the Communist Party, as the evidence before the Board showed (see R. 2618; see also *United States v. Hiss*, 185 F. 2d 822, 824, 829 (C.A. 2), certiorari denied, 340 U.S. 948), has traditionally had two broad types or classes of members—"open" members, who hold themselves out to the public as such and make no attempt to conceal their membership, and "secret" or "underground" members, whose membership for various reasons is known only to a select few in the organization.

Petitioner's elaborate attempt to depict Section 5 as a trap for the unwary—as a snare for catching as members persons who do not know they are members—disregards the nature of the items as non-

exclusive evidentiary factors and particularly ignores the provision that the jury's consideration of the types of evidence listed be "under instructions from the court." It is to be presumed that the court's guidance of the jury in its consideration of such evidence will be an intelligent guidance. Petitioner's suggestion that the only way in which a person of prudence can under Section 5 avoid the risk of being found to be a member of it is to "shun association or communication with all men" and "live the life of a hermit" (Br. 95) is certainly incompatible with that premise.

(iii) Moreover, the language of Section 5 shows that the section has no application to or connection with petitioner's duty under the Subversive Activities Control Act to file a registration statement (when the order to register becomes final) listing its members, or to possible criminal proceedings against it or its officers for willfully omitting the names of any of its members in such a registration statement. The fact that Section 5 is exclusively concerned with jury trials shows that it has no reference to the administrative process of filing a registration statement with the Attorney General. And the fact that it relates to jury trials in which the "accused person" (see *supra*, p. 165, fn. 52) is one who denies either his membership in the Party or his knowledge of the purpose or objective of the Party shows that it has no relation to possible criminal proceedings against the Party or its officers for willfully omitting the names of any

of its members in the registration statement.³³ Apparently, Section 5 of the Communist Control Act applies to criminal prosecutions brought under Section 15(a)(2) of the Subversive Activities Control Act against individual members who fail to register as required in those limited situations (defined in Section 8) in which individual members are required after Board proceedings to register personally (see *supra*, pp. 74-75).

(f) *The validity of the provision making each day of failure to register a separate offense is not presented, and in any case it is valid.*

Petitioner suggests (Br. 27, fn. 12, and 65) that "the Act provides astronomically cumulative fines and prison sentences" by Section 15(a) which declares each day of failure to register, once the obligation to do so arises, a separate offense (Br. 65).

(i) This contention, too, is prematurely raised in this proceeding. Petitioner may register, or for some other reason the penalty may never be applied to petitioner, and therefore the issue may never be reached. See *United States v. Harriss*, 347 U.S. 612, 626-627.

³³ Section 15(a)(1) of the Subversive Activities Control Act provides for the punishment of the "organization" if, having been finally ordered to register, it fails to register or to file a registration statement or annual report or to keep records as required. This is the only criminal provision connected with the registration process which is applicable to organizations as such. Section 15(b) provides for the punishment of "[a]ny individual" who, in a registration statement, willfully makes any false statement or willfully omits to state any fact required to be stated. See *supra*, pp. 82-83.

(ii) On its merits, petitioner's contention must be rejected. It is clear, in the first place, that there cannot be any such accumulation of penalties unless an organization which has been finally ordered to register chooses to incur them by continued deliberate non-compliance. An organization is not required under the Act to disobey a final order to test its validity. Cf. *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, 246 U.S. 58, 62; *Ex parte Young*, 209 U.S. 123, 145-148. The duty to register arises only after the validity of the registration requirements has been judicially determined and a final order has resulted (see *supra*, p. 77). Thus, penal liability results only from willful refusal to comply with a requirement laid down by Congress, implemented by a Board order after formal hearings, and upheld by the courts.

It is settled, moreover, that the extent of the permissible punishment imposable under an otherwise valid statute is, subject only to the Eighth Amendment's prohibition against cruel and unusual punishments, a matter of exclusive legislative discretion. *Blockburger v. United States*, 284 U.S. 299, 305; *Gore v. United States*, 357 U.S. 386. Congress was no doubt aware that effective enforcement of registration and reporting requirements is difficult where continuing disobedience can result in but a single penalty, which might be considered *de minimis* by a large organization. And, it does not follow that because a court might, in a particular case, inflict punishment in an unreasonably harsh manner that the statutory clause under which the punishment is inflicted is in-

valid. It is easy to see, for example, that the law making a separate offense of each mailing in furtherance of a fraudulent scheme could in certain cases be enforced in a confiscatory manner. But the constitutionality of the statute itself is settled. *Badders v. United States*, 240 U.S. 391, 394; cf., e.g., *Marcus v. Hess*, 317 U.S. 537, 552; *Blockburger v. United States*, *supra*, 284 U.S. 299; *Gore v. United States*, *supra*, 357 U.S. 386; *Ebeling v. Morgan*, 237 U.S. 625.

B. THE "SANCTION" PROVISIONS OF THE ACT ARE VALID

Introduction.—Immediately upon the registration of an organization under the Act, or when an order of the Board requiring an organization to register becomes final (after judicial review), certain legal consequences automatically occur. These consequences are, generally speaking, in the nature of legal disabilities. They are broadly classifiable into two types—those affecting the organization as such, and those affecting members of the organization. They have come to be known in this litigation as "sanctions" (see R. 2082). Briefly, they may be identified as the "labeling," "tax," "contributions," "employment," "passport," and "alien" provisions, the first three being applicable to organizations as entities, and the last three to individual members of the organizations affected. See *supra*, pp. 77-82; *infra*, pp. 172-201.

These sanctions are to be distinguished from the Act's criminal penalties. In addition to the criminal penalties imposed both on organizations and individuals for various offenses connected with the registra-

tion process (see *supra*, pp. 82-85), the Act imposes other penalties on individuals for certain offenses connected with four of the general sanctions (the "labeling," "contributions," "employment," and "passport" provisions; see *supra*, p. 83). But, while the sanctions become automatically operative upon an organization's registration or being finally ordered to register, a criminal penalty associated with a sanction can be enforced only in the usual manner in which criminal penalties are enforced, *i.e.*, by indictment, trial, and conviction.

Petitioner assails the sanctions of the Act on several different constitutional grounds. First, it attempts to show that the sanctions which result from a registration order, make the Act an attempt to "outlaw" petitioner (Br. 26-28) and therefore violate the freedoms guaranteed by the First Amendment (Br. 26-39). Secondly, it contends that the sanction provisions violate due process (Br. 50-56). Finally, it argues that, by virtue of the sanctions, the Act is a bill of attainder, proscribed by Article I, § 9, clause 3 (Br. 63-72). For the reasons suggested above (*supra*, pp. 85-86), the validity of none or only some of the sanctions may now be before the Court;⁵⁴ but in view of the court of appeals' treatment of this problem and petitioner's extensive argument we will discuss all of the sanctions.

⁵⁴ The "alien" and "tax" sanctions have no criminal penalties associated with them, but their validity could be tested in appropriate proceedings unconnected with the present one (*e.g.*, habeas corpus or declaratory judgment proceedings or proceedings in the Tax Court). Thus, the validity of all the sanctions can be tested in other judicial proceedings.

1. *The sanction provisions do not violate the First Amendment*²⁸

We have previously shown (*supra*, pp. 87-107) that the Act's registration provisions, as such, are consonant with the guaranties of the First Amendment. In that connection, we discussed the gravity of the evil with which Congress was dealing in this Act as well as this Court's rulings showing that First Amendment protections are far from absolute. Against the same significant background, we now consider petitioner's related contention that the Act's sanctions are individually violative of the First Amendment (Br. 37-39, 54-56) and that they confirm its contention that the Act as a whole, by in effect "outlawing" it (Br. 34), will have the practical effect of preventing it from engaging in lawful political action, in alleged further violation of the First Amendment (Br. 33-39).

(a) *Sanctions applicable to organizations as such*

The sanctions which are applicable to organizations as entities are three—the "labeling," "tax," and "contributions" sanctions.

(i) *The labeling requirements*

When an organization is registered or has been finally ordered to register, each publication of the organization transmitted by mail or in interstate or

²⁸ Since petitioner stresses the First Amendment, we include that provision of the Constitution in the heading for this sub-point, but to avoid needless duplication our discussion will also consider certain aspects of substantive due process related to the First Amendment issues.

foreign commerce and intended to be circulated among two or more persons is required to bear on its face and on any wrapper in which it is contained the statement "Disseminated by [name of organization], a Communist organization" (Section 10(1)). Similarly, all radio and television broadcasts sponsored by the organization must be identified as being "sponsored by [name of organization], a Communist organization" (Section 10(2)). Violation of these provisions by the organization or by any person acting on its behalf is made a punishable offense (Sections 10, 15(c)).

These labeling requirements most nearly approach, of all the sanctions, the area of First Amendment rights. We contend nevertheless that, measured against the evil at which the Act strikes, they are well within the power of Congress to impose.

a. Labeling imposes no censorship on any mail matter or broadcast material; the content of either is immaterial. What the provisions do is, not to censor the "speech," but to identify the "speaker." If such revelation interferes with the purposes of an organization by destroying its anonymity and disclosing its true nature, it is because of the unpopularity of the organization in the free market of ideas. The "restraints" are entirely social, not legal. Organizations subject to the requirement are at liberty to issue any literature or propaganda they choose, provided it is labeled and does not contain anything constituting a crime in itself, such as, for example, incitement to violent over-

throw of the Government. Furthermore, the labeling requirements apply to organizations only. Individuals, including members of the organizations, are not subject to even the indirect restraint of labeling.

United States v. Harriss, 347 U.S. 612, 625-626, *Burroughs v. United States*, 290 U.S. 534, 545, 548, and *Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 312, 315-316, teach that such disclosure and labeling requirements may validly be imposed within the area protected by the First Amendment in order to serve a proper purpose. In *Harriss*, the Regulation of Lobbying Act was sustained by this Court because members of Congress have a right to know "who is being hired" to attempt to influence them, and "who is putting up the money." 347 U.S. at 625. *Burroughs* upheld comparable provisions of the Corrupt Practices Act requiring disclosure by political committees of contributions in order "to safeguard [a federal] election from the improper use of money to influence the result." 290 U.S. at 545. The requirements that newspapers disclose their owners in order to enjoy second-class mail privileges and plainly mark with the word "advertisement" all items which have been paid for were held valid in the *Lewis Publishing Co.* case. These rulings demonstrate that the validity of a disclosure or labeling requirement depends upon the reasonableness of its particular aim and purpose."

"*Talley v. California*, 362 U.S. 60, which petitioner cites (Br. 38) is not inconsistent with these cases. There, the Court, in considering an ordinance forbidding the distribution in any place under any circumstance of any handbill

b. The petitioner in this case is the Communist Party, found by the Board to be foreign-controlled and engaged, having as its ultimate objective the domination, by force, of this country and the world by the world Communist movement under the leadership of the Soviet Union. In order to carry out its objectives, the Party uses propaganda as one of its main weapons (R. 2538-2543).

Much of this propaganda is covert, and all of it attempts to sell itself to the public as peacefully and lawfully inspired. The record shows that it is petitioner's standard policy to exploit situations of human misery and legitimate grievance for the foothold its organizers thereby gain in social, racial, and labor groups (R. 2558-2580). The Party frequently dons its mask of respectability and sympathy to plead for various causes which it thinks will advance its own falsely assumed status as a champion of human rights (cf. Br. 34). "Basic to those techniques [of Communism] is the element of disguise. Over and over, the Communist creed poses under a thousand masks—a thousand fronts—organizations—movements—drives—with glittering, alluring appeal

which did not have printed on it the name and address of the person who prepared, distributed, or sponsored it, emphasized that no showing had been made that the ordinance was designed to remedy any evil whatsoever (*id.*, p. 64):

"* * * Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. * * *

to snare the unwary."⁸⁷ But the ultimate objective remains steadfast and unvaried.

In theory, perhaps, if every one had the time and talent to be able to make an independent evaluation, after sufficient research, of the truth or soundness of each political utterance with which he is propagandized in the mails and over the air waves, he would have no need to know from what source the propaganda came. "But as a practical matter this independent determination is in most cases impossible, and in making judgments we are continually influenced by the source from which statements emanate." Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948), 34 Corn. L.Q. 182, 208. And nowhere is the need for disclosure of the true source of propaganda more pressing than in the case of a Communist-action organization. "In light of the Soviet allegiance of American communists, the extensive degree to which they use the technique of concealment, and the success that they have had in influencing public opinion by this technique, a requirement of disclosure would seem to be justified. This disclosure would greatly diminish their influence, not because of government suppression, but rather because of public recognition of their interests. Although it is true that some methods of achieving disclosure may infringe upon freedom of expression, the objective of putting the spotlight on communist propaganda does not limit that liberty, but adds to

⁸⁷ *Internal Security Manual Revised*, S. Doc. No. 40, 84th Cong., 1st Sess., p. 2 (Introduction to the original edition by Senator Alexander Wiley).

the relevant facts in the market-place of competing ideas" (*id.*, pp. 208-209).

As the court below remarked, "surely the people are entitled to know when an organization which falls within the definition of a Communist-action organization in this statute is addressing them over the air" (R. 2113). This observation is no less true with respect to the circularization of propaganda by mail. To paraphrase the words of Mr. Justice Black, with whom Mr. Justice Douglas concurred, dissenting in *Viereck v. United States*, 318 U.S. 236, 251 (said with reference to the Foreign Agents Registration Act):

Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the [Act] is intended to label information [emanating from a Communist source] so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.

Moreover, the petitioner calls itself the "Communist Party." There "seems little to choose", so far as petitioner is concerned, between being identified as "The Communist Party" and as "The Communist Party, a Communist organization," which is what the Act requires (see R. 2112-2113).

It is no answer for petitioner to say (Br. 39) that the requirement that it identify itself not only by name but as "a Communist organization" is discriminatory since other political parties are not subject to special

labeling requirements. This contention, like petitioner's entire First Amendment argument, assumes that petitioner is just another political party, expressing ideas in the political arena. But an organization subject to the labeling requirements of this Act is one that has been found, after a full hearing (including judicial review), to be the puppet of a foreign power, working to achieve the ends of that power—ends which encompass the extension of its totalitarian hegemony over this nation “by any available means, including force if necessary” (Section 2(6)). Cf. *National Labor Relations Board v. Falk Corp.*, 308 U.S. 453; *Bryant v. Zimmerman*, 278 U.S. 63. Supported by overwhelming evidence, the Board found that petitioner was such an organization and the court of appeals upheld this finding. And this Court has itself held that the Communist Party is not merely an ordinary political party and need not be treated as such. See *Barenblatt v. United States*, 360 U.S. 109, 127–129, and the cases cited *supra*, pp. 95–100.

When an agency of the world Communist movement poses for tactical purposes as a benign domestic organization and champion of constitutional liberties, while concealing its ultimate strategy of foisting a communistic dictatorship on the nation in a Czechoslovakia-type or Hungary-type coup as soon as it feels the time to be propitious—i.e., when its leaders are in positions of sufficient power and the ranks of its lesser members have been sufficiently strengthened by the victims of its propaganda (cf. Mr. Justice Jackson, concurring in *Dennis v. United States*, 341 U.S. 494, 566)—we submit that Congress can act to

defeat the strategy by compelling the truthful identification of the source of the propaganda, to the end that the people may not be deceived.

c. We have seen that Congress has the power to require disclosure or labeling when the purpose of such a requirement is reasonable and that the exercise of such power in the area of concealed Communist propaganda clearly falls within that area. We now show that there is particularly strong precedent for labeling requirements, which are aimed not at private correspondence but at literature sent through the mails or in commerce with the intent that it be circulated publicly.

A 1912 statutory requirement provides that newspapers and magazines, to enjoy the privileges of second-class mail, must publicly disclose the names of their owners and plainly mark with the word "advertisement" all items which have been paid for (Act of August 24, 1912, c. 389, Section 2, 37 Stat. 553; now 39 U.S.C. 233, 234). Sustaining this law against the charge that it unconstitutionally abridged freedom of the press, this Court quoted with approval from the committee report on the bill, as follows (*Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 312, 315-316):

* * * It is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interests the publication represents. We believe that * * * it is not only equitable but highly desirable that the public should know the individuals who own or control them.

The purpose behind that statute—which this Court described as “secur[ing] to the public in ‘the dissemination of knowledge of current events,’ by means of newspapers, the names not only of the apparent, but of what might prove to be the real and substantial owners of the publications, and to enable the public to know whether matter which was published was what it purported to be or was in substance a paid advertisement” (*id.*, pp. 315–316)—was held in no wise to constitute a forbidden invasion of freedom of the press. The pertinence of this decision is clear. If Congress may condition the enjoyment of second-class mail privileges by publishers on their making full disclosure of the true interests represented by their publications, Congress may also require a Communist-action organization to label its publications, or else desist from distributing them by mail.

Similarly, the power of the Government to prevent the fraudulent use of its own mail facilities is a broad one; and has long been established.” This power has

“In 1872, Congress authorized the Postmaster General to forbid the payment of money orders and the delivery of registered letters to persons or companies found by him to be conducting an enterprise to obtain money by false pretenses through the use of the mails, and to return all such letters to their senders with the word “fraudulent” stamped on the envelope (Act of June 8, 1872, c. 335, Section 300, 17 Stat. 322; now 39 U.S.C. 259, 732). In the same statute, Congress made it a criminal offense to place any letter or package in the mails for the purpose of carrying out any scheme or artifice to defraud (*id.*, Section 301, 17 Stat. 323; now 18 U.S.C. 1341). In 1889, Congress declared all letters and other matter designed to perpetrate frauds to be “non-mailable” (Act of March 2, 1889, c. 393, Section 4, 25 Stat. 874; now 39 U.S.C. 256). In 1895, the Postmaster General’s fraud-order

been sustained against contentions that it is, in itself, violative of First Amendment and other constitutional rights. *In re Rapier*, 143 U.S. 110; *Horner v. United States*, 143 U.S. 207; *Public Clearing House v. Coyne*, 194 U.S. 497, 507; *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407. Recently, this Court again sustained the power in the following language (*Donaldson v. Read Magazine*, 333 U.S. 178, 190):

All of the foregoing statutes [mail fraud statutes], and others which need not be referred to specifically, manifest a purpose of Congress to utilize its powers, particularly over the mails and in interstate commerce, to protect people against fraud. This governmental power has always been recognized in this country and is firmly established.

Rejecting a contention that the First Amendment stood as a bar to congressional action designed to free the mails of fraudulent material, the Court added (*id.*, p. 191):

* * * None of the recent cases to which respondents refer, however, provide the slightest support for a contention that the constitutional guarantees of freedom of speech and

powers were extended to cover all letters or other matter sent by mail (Act of March 2, 1895, c. 191, Section 4, 28 Stat. 964; now 39 U.S.C. 259). Other statutes, such as the Securities Act of 1933 (Act of May 27, 1933, c. 38, Section 5, 48 Stat. 77, as amended by the Securities Exchange Act of 1934, c. 404, Section 204, 48 Stat. 906; now 15 U.S.C. 77e) and the Federal Trade Act of 1938 (Act of March 21, 1938, c. 49, Section 4, 52 Stat. 114; now 15 U.S.C. 52, 53), contain provisions similarly designed to rid the mails and the channels of commerce of false or fraudulent securities, advertising matter, and the like.

freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes.

Congress has not, in the Internal Security Act, attempted to exercise the same degree of control as it employs to prevent the type of mail fraud involving financial swindles. The literature-labeling provisions constitute a far milder form of sanction or control-measure, *viz.*, compulsory identification. The provisions do not relate to the contents of any mail matter, however fraudulent they may be, or however inflammatory. They simply identify the sender organization—which in petitioner's case has no unqualified right to conduct its affairs in secret (cf. *United States v. Morton Salt Co.*, 338 U.S. 632, 652)—with an identifying phrase found to be truthful after a full hearing.

The employment of reasonable identification devices to forestall public deception has other statutory precedents. Congress has provided that all political circulars and other statements relating to candidates running for federal office, which are deposited in the mails or in interstate commerce, must include the names of the persons or groups responsible for the publication in question, as well as the names of the officers of each such group (18 U.S.C. 612). The Foreign Agents Registration Act contains rigorous requirements applicable to the dissemination of "political propaganda" through the mails or commerce. All such propaganda must be labeled with the notation that the sender is registered as an agent of a foreign principal,

together with the names and addresses of the agent and of each of his foreign principals (22 U.S.C. 614)."

d. The identification requirements of Section 10 pertaining to radio and television broadcasts are as valid as the literature-labeling requirements, and for the same reasons. Indeed, the reasonableness of requiring accurate identification of speaker and sponsor in such mass media of communication as radio and television is even more apparent, since, because of the inherent physical limitations of those media— "[u]nlike other modes of expression, radio inherently is not available to all"—they are peculiarly subject to government control in the public interest. *National Broadcasting Co. v. United States*, 319 U.S. 190, 226; see *Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266, 285; *Trinity Methodist Church, South v. Federal Radio Commission*, 62 F. 2d 850, 851 (C.A. D.C.), certiorari denied, 288 U.S. 599. All paid broadcasts over any radio station have been required since 1934 to be identified and announced at the time of the broadcast as having been paid for by the person furnishing the money (Communications Act of 1934, c. 652, Section 317, 48 Stat. 1089; 47 U.S.C. 317). The Act at bar simply carries this principle one step further in the case of organizations finally ordered to register by requiring them to give the additional identifying

"In addition, the Foreign Agents Registration Act goes much further than the Act at bar in another respect. It declares certain types of political propaganda to be entirely nonavailable at the discretion of the Postmaster General under certain circumstances (22 U.S.C. 618(d)).

words, "a Communist organization," a phrase which, as we have shown, is little different from petitioner's chosen name and which cannot be deemed unfairly stigmatizing or discriminatory, in view of the nature of the world Communist movement and petitioner's subordination to it.

(ii) *The tax provisions*

Section 11(a) of the Act disallows the deduction for tax purposes of contributions to any organization which is registered or has been finally ordered to register as a Communist organization, and Section 11(b) denies to such an organization tax exemption under Section 101 of the Internal Revenue Code (26 U.S.C. 101).

Petitioner apparently does not specifically question the validity of these provisions, and, in any event, there can be no real doubt of the power of Congress to withdraw its legislative grace, for reasons of policy, in specific areas relating to taxation. It is clear that the conferring of tax-exempt status on an organization and permitting the deduction from gross income for tax purposes of sums contributed to such organization are matters of legislative grace. *Helvering v. Ohio Leather Co.*, 317 U.S. 102, 106; *Helvering v. Northwest Steel Mills*, 311 U.S. 46, 49; *Cornell v. Coyne*, 192 U.S. 418, 431; *Rector of Christ Church v. County of Philadelphia*, 24 How. 300; cf. *Cammarano v. United States*, 358 U.S. 498. Such grants vest no permanent right in the favored class to continue its enjoyment of special treatment (*Choate v. Trapp*, 24 U.S. 665, 674; *Yazoo and Mississippi Valley Ry. Co. v. Adams*, 180 U.S. 1, 22) and may be withdrawn at

will by legislative act. *Rector of Christ Church v. County of Philadelphia, supra.*

Federal tax-exemption and deductibility provisions are founded on the public interest in fostering, as a matter of policy, the types of activity pursued by the favored organizations (*Helvering v. Bliss*, 293 U.S. 144, 150-151), most of which enjoy that status because, by performing public services, they relieve the public *pro tanto* of a burden which otherwise would fall on it. *Trinidad v. Sagrada Orden*, 263 U.S. 578, 581. Since they thus constitute a form of subsidy to activities deemed by Congress to be beneficial to the public, Congress may withdraw its favor when it sees that a one-time beneficiary of its grace is engaged in activities thought to be inimical to the public interest. It would be strange if this Government were required to foster through special exemptions in its tax laws the activities of a domestic agency of a world-wide movement which is dedicated to its violent overthrow.⁶⁰

⁶⁰ *Speiser v. Randall*, 357 U.S. 513, is not in point. There, this Court, in considering a state statute denying tax deductions to organizations whose officers refused to take an oath that they did not advocate the overthrow of the Government by force and violence, found the statute unconstitutional on a procedural ground—i.e., because the statute put the burden of proof on the claimant that his oath was true. Here, the burden is on the Attorney General to prove his case by a “preponderance of the evidence” (Section 14(a)), and the organization has the protection of a quasi-judicial hearing and judicial review. In addition, unlike in *Speiser*, this Act does not purport “to deal directly with speech and the expression of political ideas” (357 U.S. at 527). Rather, as we have shown (*supra*, pp. 93-95), here Congress has attempted to strike at an evil “thought sufficiently grave to justify limited infringement of political rights” (*ibid.*).

(iii) *The contributions prohibition*

Section 5(a)(2)(A) indirectly affects organizations required to register under the Act by making it unlawful for any officer or employee of the United States or of any defense facility, with knowledge or notice that an organization is registered or has been finally ordered to register, to contribute funds or services to such an organization. Violations are punishable by fine or imprisonment or both (Section 15(c)).

This provision has only an indirect and conjectural effect on petitioner's finances. Nevertheless, we shall assume *arguendo* that the effect of this prohibition on petitioner is not so remote as to deprive it of standing to challenge. Cf. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 458-460; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 143, 150-160; *Pierce v. Society of Sisters*, 268 U.S. 510, 535-536; *Buchanan v. Warley*, 245 U.S. 60, 72-73; *Truax v. Raich*, 239 U.S. 33, 38-39; but see *Tileston v. Ullman*, 318 U.S. 44.

The forbidding of money contributions or other contributions of value by government and defense-facility employees to a Communist-action organization, as the term is defined in this Act, is a reasonable measure in relation to the problem which faced Congress and which led to the passage of the Act. If Congress can validly forbid employees of the United States to engage in partisan politics (*United Public Workers v. Mitchell*, 330 U.S. 75), it can validly forbid them to contribute to the welfare of an organization found to have as one of its primary objectives the

destruction of their employer at the earliest feasible opportunity. Similarly, if the Government has the power to safeguard itself by barring government employment to persons who are members of Communist-action organizations (see *infra*, pp. 188-190), it has also the power to forbid its employees to contribute to the treasury of an organization dedicated to its forcible overthrow. Since the prohibition has prospective effect only, no employee can complain of it. If he insists on his right to make the prohibited contribution, he must quit the employment which Congress has declared to be incompatible with this particular type of political donation. See *Adler v. Board of Education*, 342 U.S. 485, 492.

The prohibition against the making of contributions to registered organizations by defense-facility employees, is, we submit, on no greatly different footing. The importance of keeping subversive elements out of the ranks of employees of defense facilities is no less pressing than in the case of employees of the Government itself. If Congress can validly provide that members of a registered Communist-action organization shall be ineligible for defense-facility employment, as we think it can (see *infra*, pp. 190-194), it can also forbid the employees of such facilities to support such an organization with money contributions.⁴¹

⁴¹ Petitioner points out (Br. 6) that under Section 3(6) the term "to contribute funds or services" is defined to include the " * * * making of any gift, subscription, loan, advance, or deposit, of money or of anything of value * * *" (emphasis added). From this it reasons that the prohibition of

(b) *Sanctions applicable to individual members of organizations ordered to register*

There are three general categories of sanctions applicable to individual members of organizations which have registered or been finally ordered to register—the “employment,” “passport,” and “alien” provisions. Again, we assume *arguendo* (though the point is doubtful) that petitioner has standing to contest these provisions, which do not apply directly to it, but only to its members (see *supra*, p. 186).

(i) *The employment restrictions*

The employment restrictions are broadly divisible into three types: prohibitions against (a) employment by the Federal Government, (b) employment in any defense facility, and (c) holding office in or employment with any labor organization or as an employer-representative in a proceeding under the National Labor Relations Act.

a. *The prohibition against employment by the Federal Government*

When an organization is registered under the Act or has been finally ordered to register, all of its members having knowledge or notice of that fact

Section 5(2)(A) extends to “subscribing” to a publication of an organization ordered to register. It is clear, however, under the principle of *eiusdem generis*, that Congress, in using the term “subscription,” meant the act of subscribing in the sense of “promis[ing] to give or contribute, by writing one’s name with the amount” (Webster’s *New International Dictionary*, 2d ed., unabridged), rather than in the more colloquial sense of “enter[ing] one’s name for a newspaper, a book, etc.” (*ibid.*).

are forbidden to conceal or fail to disclose their membership in seeking, accepting, or holding any non-elective employment with the Federal Government (Section 5(a)(1)(A)) or to hold such employment (Section 5(a)(1)(B)), under penalty of a fine or imprisonment or both (Section 15(c)).

The reasonableness and validity of these provisions is clear. "The restrictions upon Government employment," as the court below observed, "are directly related to the substantive evil at which Congress was aiming in this statute. Infiltration of government by world Communist adherents is one of the specified evils recited by the Congress [Section 2(1)] and certainly a prohibition of Government employment to such adherents is a direct attack upon that evil. Indeed we can think of no more direct relationship than that which would exist between the objectives of the world Communist movement, as it is described in this statute, and the occupation of Government positions by members of a Communist-action organization" (R. 2110).

Both Congress and the Executive have repeatedly provided that persons who are members of organizations advocating overthrow of the Government cannot become or remain federal employees. *E.g.*, Hatch Act (of August 2,) 1939, c. 410, Section 9A, 53 Stat. 1148; Emergency Relief Appropriation Act of 1941, c. 432, Sections 15(f), 17(b), 54 Stat. 611; E.O. 9835 of March 21, 1947 (12 F.R. 1935); E.O. 10450 of April 27, 1953 (18 F.R. 2489). The prohibition in this Act applies only to those members of Communist-action organizations who continue to re-

main members with knowledge or notice that the organization to which they belong either has voluntarily registered under the Act or has been finally ordered to do so. *Bona fide* termination of membership ends the applicability of the provisions. That Congress possesses this power to bar from the ranks of employees of the United States Government persons who knowingly remain members of an organization after that organization has been duly found to be a Communist-action organization, and has been finally ordered to register as such, is beyond doubt. See *Wieman v. Updegraff*, 344 U.S. 183, 188-192; *Adler v. Board of Education*, 342 U.S. 485, 494-495; *Garner v. Los Angeles Board*, 341 U.S. 716.⁶² And the power to exclude such members entirely from government employment includes the power to penalize those who willfully conceal their membership in order to obtain or continue to hold such employment.

b. The prohibition against employment in any defense facility

When an organization is registered under the Act or has been finally ordered to register, all of its members having knowledge or notice of that fact are prohibited from concealing or failing to disclose their membership in seeking, accepting, or holding employment in any defense facility (Section

⁶² The substantive power of the Federal Government to dismiss employees on loyalty grounds has been assumed by both the parties and the Court in such cases as *Peters v. Hobby*, 349 U.S. 331, and *Cole v. Young*, 351 U.S. 536. The only issues in those cases were whether the Government had followed the procedures it had established for dismissal and whether such procedures were constitutional.

5(a)(1)(C)) or, if the organization is a Communist-action organization, from working in any defense facility (Section 5(a)(1)(D)), under penalty of a fine or imprisonment or both (Section 15(c)).

These provisions are on a par with those relating to government employment. The court below summed up the pertinent considerations when it said, "We think the considerations which validate power to forbid Government employment likewise support the power to forbid defense facility employment. The latter employment is sensitive business, and it would be sheer folly to say that the Government cannot close the gates of such facilities against those who are knowingly members of organizations under the dominion of a foreign government" (R. 2111). Particularly is this true, we would add, when the danger caused by the foreign government is the very *raison d'être* of most of these defense facilities.

The manifest purpose of these provisions is to guard against sabotage and espionage in establishments vital to the national defense. They constitute a valid exercise of the war and defense powers. Congress has never regarded itself, or been thought by the courts to be, impotent to deal with the problems of sabotage and espionage in defense facilities. See, e.g., 18 U.S.C. 793-794 (espionage); 18 U.S.C. 2151-2156 (sabotage); *Korematsu v. United States*, 323 U.S. 214, 216-217; *Gorin v. United States*, 312 U.S. 19; *United States v. Gray*, 207 F. 2d 237, 241 (C.A. 9); *Parker v. Lester*, 112 F. Supp. 433, 443 (N.D. Cal.), reversed on other grounds, 227 F. 2d 709 (C.A. 9).

Nor is Congress limited, in striking at these evils, to exacting criminal penalties after they occur. It can adopt reasonable measures to prevent their occurring. The *Gray* case involved the constitutionality of the so-called Magnuson Act of August 9, 1950, c. 656, 64 Stat. 427, 50 U.S.C. 191, 192, which, together with the regulations promulgated under it (see E.O. 10173 of October 18, 1950 (15 F.R. 7005); E.O. 10277 (16 F.R. 7537); E.O. 10352 (17 F.R. 4607)), are known as the Port Security Program. It provides for Coast Guard screening of workers in harbors, ports, vessels, and waterfront facilities. The Court of Appeals for the Ninth Circuit, while it found the procedures in the particular cases before it defective, had no doubt of the power of Congress to prohibit members of subversive organizations from engaging in employment which would give them opportunities to commit sabotage and espionage. "There seems no reason to doubt that the screening operation initiated by the Magnuson Act is a legitimate war measure" (207 F. 2d at 241). Similarly, the district court in *Parker v. Lester, supra*, 112 F. Supp. at 443, referred to the same Port Security Program as being justified by "the undoubted right of the Nation to protect itself from subversion." And the court of appeals, although reversing the district court decision because of procedural defects, stated (227 F. 2d at 718):

It may be taken for granted that in view of the emergencies referred to in the Act and in the Executive order it was altogether appropriate to establish a system whereby persons who are security risks may be denied employment

upon merchant ships. The existence of the emergency, the seriousness of the danger legislated against, and the necessity for such legislation are for determination by other Departments of the Government, not by us. We think it clear that the screening of persons who are security risks is permissible as a matter of substantive due process.

If ship and harbor workers may, subject to criminal penalties for non-compliance (50 U.S.C. 192), be denied clearance to work as a security measure to protect our merchant marine and harbor facilities, we submit that the same considerations justify the prohibitions of Section 5(a)(1) (C) and (D) of the Act at bar. Both programs subject violators to criminal sanctions appropriate to curb the evil aimed at. Both are valid exercises of the nation's power to provide for its own survival.

We must assume that the Secretary of Defense, under the power granted him by Section 5(b), will designate "defense facilities" just as vital to national security as are ships, ports, and waterfront installations. And despite petitioner's claim of "unfettered" and "unreviewable authority" to designate any private enterprise, including the most non-sensitive (Br. 54), it is evident that the Secretary's discretion, while unquestionably broad, would not be unlimited; if it were abused by an unreasonable designation this would doubtless either be a defense in a criminal prosecution or could be challenged in some other judicial proceeding. Cf. *Speiser v. Randell*, 357 U.S. 513; *Truax v. Raich*, 239 U.S. 33.

Petitioner's further argument that its members cannot be barred from work in non-sensitive jobs in sensitive businesses (Br. 54) is also untenable. Neither Congress nor the Secretary of Defense is *constitutionally* required to make the difficult distinctions between "sensitive" and "non-sensitive" jobs at such installations as the Oak Ridge laboratories.⁴³ Congress has the power, if that is its policy, wholly to bar those who insist on remaining a part of the world Communist movement from establishments which, because of the general nature of their business, are properly classifiable as "defense facilities."

c. The prohibition against holding office or employment with a labor organization or as an employer-representative in a proceeding under the National Labor Relations Act

When an organization is registered under the Act or has been finally ordered to register, it becomes unlawful for any member having knowledge or notice of that fact to hold office in or employment with any labor organization as defined in the National Labor Relations Act (see *supra*, p. 80, fn. 24), or to represent any employer in any proceeding under that Act (Section 5(a)(1)(E)),⁴⁴ under penalty of a fine or imprisonment or both (Section 15(c)).

By its terms this prohibition is applicable only to the holding of office in or employment by labor organ-

⁴³ At the present time, by contract, the Secretary of Defense exercises his discretion as to which physical areas of defense facilities that have classified government contracts shall be accessible only to persons having security clearance.

⁴⁴ These provisions were added to the Subversive Activities Control Act by Section 6 of the Communist Control Act of 1954, 68 Stat. 777.

izations; it does not extend to mere membership in a union. We submit that the validity of this provision is a logical corollary of *American Communications Assn. v. Douds*, 339 U.S. 382. The Court there sustained the validity of Section 9(h) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, under which the benefits of that Act were limited to unions whose officers filed with the Labor Board affidavits attesting that they were not members of the Communist Party. The objective of the clause in issue, as this Court observed, was the elimination of the obstruction to interstate commerce resulting from the so-called "political strike," which Congress had found after lengthy studies to be the result of the infiltration by Communist Party members into positions of power in labor organizations (339 U.S. at 388-389). "No useful purpose would be served," said the Court, "by setting out at length the evidence before Congress relating to the problem of political strikes, nor can we attempt to assess the validity of each item of evidence. It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action" (*ibid.*). See also *Osman v. Douds*, 339 U.S. 846; *National Labor Relations Board v. Highland*

Park Co., 341 U.S. 322, 325; *National Labor Relations Board v. Dant*, 344 U.S. 375, 385.

The *Douds* decision thus accepted as a reasonable basis for the non-Communist affidavit legislation the Congressional finding that Communists in positions of influence in labor unions tend to promote political strikes and thereby to endanger the national interest in time of peace as well as of national peril. This finding was reinforced by the findings of Section 2 of the Act at bar, which emphasize even more forcefully the need to keep adherents of the world Communist movement out of positions of influence in labor and industry (see, particularly, Section 2(1) and (15)).⁴⁵

On that basis, there is no significant difference between the policy and purpose of Section 9(h) of the amended National Labor Relations Act and Section 5(a)(1)(E) of the Subversive Activities Control Act. If a union officer who cannot subscribe to a non-Communist affidavit can be forced out of his position of leadership in the union by the indirect method of depriving his union of rights it would otherwise enjoy before the Labor Board, there can be no infirmity in directly prohibiting him from being on a labor union staff as an officer or employee. The justification for either method is the same—the reasonableness of r—

⁴⁵ See also the portion of the Board's report (R. 2562-2660) relating to Communist infiltration into the labor union movement, the control exercised by Communists over national trade union activities, the systematic training of Communist organizers to gain leverage within the basic industries, and the use made by petitioner of the political strike as an effective means of crippling the economy in periods of crisis.

moving from positions of influence in unions those persons who can be expected to use these positions to the detriment of the nation. In neither case is any person permanently or categorically barred from holding such a position—he can by renouncing in good faith his Communist ties resume his eligibility with respect to his union. *American Communications Assn. v. Douds*, *supra*, 339 U.S. at 414. His ineligibility is only with respect to a special category of employment and lasts only for so long as he continues it by a self-imposed exile.” See also *infra*, pp. 204–208, 211. ✓

What has been said with respect to the prohibition against holding office or employment with a labor union applies with equal force to the prohibition against representing any employer in any proceeding arising under the Labor Act. The same logic which underlies the need to eradicate members of Communist-action organizations from positions of influence in labor unions is equally applicable to management representatives, who, from their places on the other side of the bargaining table, could not only exert an adverse influence on interstate labor-management relations and thus on interstate commerce, but could use their positions for political ends to the same extent as union officials. Such representatives are clothed with broad powers and enjoy “an operating participation in governmental facilities.” Na-

“We are dealing here only with *members* of a Communist-action organization. No self-appraisal or searching for subjective beliefs is called for—unlike some aspects of the non-Communist affidavit clause of the Labor Act. See *Osman v. Douds*, 339 U.S. 846.

tional Maritime Union of America v. Herzog, 78 F. Supp. 146, 172 (D. D.C.), affirmed, 334 U.S. 854.

(ii) *The passport provisions*

When an organization is registered under the Act or an order directing it to register has become final, members of the group having knowledge or notice of that fact are prohibited from applying for, seeking to renew, using, or attempting to use any passport issued under the authority of the United States (Section 6(a)). In addition, officers and employees of the United States are forbidden to issue passports to or renew passports of any individuals whom they know or have reason to believe to be members of a Communist-action organization which has registered or been finally ordered to register (Section 6(b)). Violations of these prohibitions are punishable by fine or imprisonment or both (Section 15(c)). Taken together, these provisions remove from eligibility for passports all persons who remain members of a Communist-action organization after it registers or is finally ordered to do so.

At the present time, a passport has the dual function of extending governmental protection while abroad and also of granting permission to travel to many parts of the world. See *Shachtman v. Dulles*, 225 F. 2d 938 (C.A. D.C.). In the first aspect, a passport is addressed to foreign governments and requests for the holder "permission to come and go as well as lawful aid and protection." *United States v. Browder*, 113 F. 2d 97, 98 (C.A. 2), affirmed, 312 U.S. 335; Borchard, *Diplomatic Protection of Citizens*

Abroad (1915), p. 493; cf. *Urtetiqui v. D'Arcy*, 9 Pet. 692, 698. An American passport "indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and requests on the part of the Government of the United States that the officials of foreign governments permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection." 3 Hackworth, *Digest of International Law* (1942), ch. X, § 259. Certainly, as remarked by the court below, "the Government may validly decline to confer its diplomatic protection upon, and to request foreign governments to give aid and protection to, a member of an organization operating primarily to achieve the objectives of a world movement such as the Communist movement is defined to be in this statute. Surely a government owes no duty of protection to those who, dominated by a foreign organization, seek its overthrow" (R. 2111).

The passport sanction is also valid insofar as it prevents travel abroad by members of a Communist-action organization. Congress has specifically found in the Act that "[d]ue to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the world Communist movement" (Section 2(8)). It is evident that

the unity and cohesive force of the world Communist movement, and its capacity to endanger the independence of this Government and the continuation of our free institutions, are promoted through personal contacts of its members both here and abroad. For one thing, there is evidence that American Communists have secured the traditional indoctrination in the Soviet Union given to most non-Russian Communist leaders (see R. 2597-2603), and travel abroad by local Communist leaders certainly facilitates their effectiveness as couriers, both of intelligence to foreign countries and of directives to this country (see R. 2605-2613). Aside from the findings of the Board on this subject (R. 2596-2613), it is also of judicial record that Communist leaders have made fraudulent use of passports in the past. See, e.g., *Browder v. United States*, 312 U.S. 335; *Eisler v. United States*, 176 F. 2d 21 (C.A. D.C.), certiorari denied, 337 U.S. 958. For these reasons, the barring, in effect, of foreign travel outside of the Western Hemisphere to persons continuing their membership in a Communist-action organization is valid as an appropriate method of obtaining the serious and legitimate congressional objectives embodied in the Act. *Briehl v. Dulles*, 248 F. 2d 561, 571-573 (C.A. D.C.), reversed on other grounds *sub nom. Kent v. Dulles*, 357 U.S. 116; *Dayton v. Dulles*, 254 F. 2d 71, 73-74 (C.A. D.C.), reversed on other grounds, 357 U.S. 144; cf. *Galvan v. Press*, 347 U.S. 522, 529."

"For fuller discussion of the power of Congress validly to restrict the travel of members of the Communist Party, see the Government's Briefs for the Respondent in *Kent v. Dulles*.

Thus, the prohibitions of Section 6 (a) and (b) relating to use or attempted use of passports by members of covered organizations and the issuing or the renewing of passports to such persons by federal employees are clearly reasonable. Nor is it unreasonable to impose criminal sanctions for the very act of applying for a passport with knowledge of ineligibility under the law to receive one. Congress might, it is true, have limited itself to the punishment of false representations in and fraudulent use of passports—crimes already defined in the criminal code. 18 U.S.C. 1541-1546; see *Browder v. United States*, *supra*, 312 U.S. 336; *Warszower v. United States*, 312 U.S. 342; *United States v. Rubenstein*, 151 F. 2d 915 (C.A. 2), certiorari denied, 326 U.S. 766. But these remedies would not have as effectively prevented attempts by members of covered organizations to obtain passports despite known ineligibility. They could apply for and, perhaps by concealing pertinent information, obtain a passport. The use of aliases is a commonplace among them.⁶⁶ Congress preferred to forestall such frauds—which may be difficult to prove—by making the application for a passport a crime.

(iii) *The provisions applicable to aliens*

a. *Exclusion and deportation*

Petitioner does not attack the exclusion and deportation sanctions presumably because, as stated in its

No. 481, Oct. Term 1957, at pp. 60-75, 89-100, and *Dayton v. Dulles*, No. 621, Oct. Term 1957, at pp. 46 ff.

⁶⁶ See, for example, the aliases used by Gerhardt Eisler and other foreign representatives to petitioner (R. 2525-2528).

original brief, it "recognize[s] that *Galvan v. Press*, 347 U.S. 522, is decisive of the validity of the deportation and exclusion sanctions" (p. 72, fn. 31). Since we agree that *Galvan* is decisive (see also *Niukkanen v. McAlexander*, 362 U.S. 390), there is no need for further discussion of these particular sanctions, which are described at p. 80, *supra*.

b. Ineligibility for naturalization

Under Section 313(a)(2)(G) of the Immigration and Nationality Act of 1952, which substantially reenacts and carries forward the naturalization provisions of the now-repealed Section 25 of the Subversive Activities Control Act, any alien who is a member of or affiliated with a Communist-action organization during such time as it is registered or required to be registered under the latter Act is ineligible for naturalization. Petitioner, while it does not expressly admit the validity of this sanction, does not specifically challenge it (see Br. 55). In any event, there can be no real doubt of its constitutionality, in view of the plenary power of Congress to impose conditions upon the conferring of citizenship by naturalization. *Schneiderman v. United States*, 320 U.S. 118, 131; *United States v. Macintosh*, 283 U.S. 605, 615; see Note, *The Internal Security Act of 1950* (1951), 51 Colum. L. Rev. 606, 644-645. Certainly, it lies within the power of Congress to withhold the privilege of citizenship from alien members of an organization found to be the domestic instrument of the foreign government or group controlling the world Communist movement

and to be dedicated to promoting the objectives of that movement. If the exclusion and deportation sanctions are valid, as petitioner has conceded (*supra*, pp. 201-202), the validity of this sanction necessarily follows *a fortiori*.

c. Denaturalization

Section 25 of the Act, besides enacting the prohibition against naturalization just discussed, contained a further provision amending the nationality laws with respect to denaturalization proceedings. Like the other provisions relating to immigration and nationality, this provision is now contained in the Immigration and Nationality Act of 1952, which carried it forward as Section 340(c). Applying only to persons who become naturalized after the effective date of the latter Act,⁶⁶ it provides that if any such person shall within five years next following his naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded him from naturalization under the provisions of Section 312,⁷⁰ that fact shall be considered *prima facie* evidence, warranting revocation of citizenship in a denaturali-

⁶⁶ *I.e.*, December 24, 1952. The Immigration and Nationality Act, passed on June 27, 1952, took effect 180 days later (Section 407, 66 Stat. 281). The provision in question in its original form, *i.e.*, before it was transferred to the Immigration and Nationality Act of 1952, applied to persons naturalized "after January 1, 1951" (Section 25 of the Subversive Activities Control Act).

⁷⁰ This includes Communist-action organizations registered or required to register under the Subversive Activities Control Act.

zation proceeding if not rebutted, of lack of attachment to the principles of the Constitution and of the quality of being well disposed to the good order and happiness of the United States at the time of his naturalization.

We submit that this sanction is valid. Persons who obtain their naturalization after December 24, 1952, do so subject to the conditions and provisions laid down by Congress, including this provision. There can be no question of retroactivity, or of the Government's taking back its grant of citizenship on grounds which the naturalized person could have had no reason to anticipate when he received it. In view of the broad power of Congress to impose conditions on its grant of citizenship (*Schneiderman v. United States*, *supra*, 320 U.S. at 131; *United States v. Macintosh*, *supra*, 283 U.S. at 615) and the reasonableness of the rebuttable presumption established by this provision for the future, it cannot be said to be beyond Congressional authority. Cf. *Galvan v. Press*, 347 U.S. 522; *Carlson v. Landon*, 342 U.S. 524, 535-536.¹¹

2. *The member-sanction provisions do not rest on innocent or unknowing past membership and therefore do not deprive petitioner's members of due process*

Petitioner contends (Br. 50-56) that the sanctions imposed on members of action organizations which have registered or been ordered to register are im-

¹¹ The court below did not pass upon this provision. It said, "A denaturalization does not flow automatically from registration; a regular proceeding for the purpose must be brought. No such case is before us * * *" (R. 2115). Accordingly, the court expressed no views as to the validity of this sanction, saying that decision thereon "must await a specific test" (*ibid.*).

posed even though the members "have no knowledge of the alleged character of petitioner" (Br. 51); in alleged violation of the rule of *Wieman v. Updegraff*, 344 U.S. 183. Petitioner also argues that, because the Act "makes conclusive a presumption of unfitness [i.e., to do the things forbidden by the sanctions] arising from membership" (Br. 53), it conflicts with *Adler v. Board of Education*, 342 U.S. 485.⁷²

Petitioner's contention that the member-sanctions are visited upon "innocent" and "unknowing" members fails to take adequately into account the conditions which must be fulfilled before those sanctions become applicable. We limit our discussion to those member-sanctions applicable to citizens, viz., the employment restrictions and passport prohibitions. The alien sanctions are not, we believe, open to any serious challenge on the grounds urged.⁷³ The employment and passport provisions (and their supporting criminal penalties) are applicable only when the members of an organization have "knowledge or notice".⁷⁴

⁷² We point out, once again, that petitioner raises this issue on behalf of its members, none of whom is before the Court.

⁷³ As has been seen, petitioner has conceded the validity of the exclusion and deportation sanctions (*supra*, pp. 201-202), and, for the reasons set forth at pp. 202-204, *supra*, we believe the validity of the naturalization sanction and the denaturalization sanction, establishing a *rebuttable* presumption for the future, is equally beyond dispute.

⁷⁴ The Act provides that publication in the Federal Register of the fact that an organization has registered or been finally ordered to register "shall constitute notice to all members of such organization" that it has so registered or been finally ordered to do so (Sections 9(d), 13(k)). Since petitioner does not challenge the validity of these provisions (see Br. 53, fn. 21), we shall not discuss them otherwise than to state that their

either that the organization has registered voluntarily or has been finally ordered to do so after court review (Sections 5(a)(1), 6(a))." In complaining that these sanctions are imposed on members without regard to whether or not they have "knowledge of the alleged character of" the organization, petitioner is apparently arguing that it is not permissible to impose sanctions on a member if he does not agree with the organization's own estimate of its character or with the formal finding made by the Board and upheld by the courts. Nothing in the due process clause or this Court's *Wieman* decision, *supra*, supports such a claim.

Wieman held that the due process clause does not permit "a state, in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they *had* belonged" (344 U.S. at 190; emphasis added). "[M]embership may be innocent," observed the Court (*ibid.*), and "[i]ndiscriminate classification of innocent with knowing activity * * * offends due

validity is clear under such decisions as *United States v. Balint*, 258 U.S. 250, 251-252, and *Shewlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68-70. The Act also requires the Attorney General to notify all individuals the reporting organization lists as officers or members (Section 7 (g)).

¹⁵ As petitioner points out (Br. 54), an officer or employee of the United States or of a defense facility is forbidden under Section 5(a)(2) to employ, and an officer or employee of the United States is forbidden under Section 6(b) to issue a passport to, any individual who he knows or has reason to believe is a member of a registered action organization or of an action organization which has been finally ordered to register, without regard to any "knowledge or notice" on the part of the applicant. These special situations, however, do not, in our opinion affect the due process issues raised by petitioner. Cf. the original decision of the court of appeals, R. 2105.

process" (*id.*, p. 191). But the employment and passport provisions of the Act at bar are not imposed on "innocent," "unknowing," former members of any organization. They apply only to *current* members of organizations which either admit being (by registering) or are formally found to be (by a judicially-reviewed Board finding) substantially controlled by the foreign government or group which controls the world Communist movement and to be primarily operating to advance the objectives of that movement.

If perchance a member was not aware of these facts before the organization's registration or the entry of a final order directing it to do so, he is made aware of them when the one or the other of these eventualities occurs. He then has it within his power to "renounce the allegiances" and effect a "voluntary alteration of the loyalties" (*American Communications Assn. v. Douds*, 339 U.S. 382, 414) which threaten to bring disabling consequences on him. He can avoid the Act's sanctions by a good-faith termination of his membership. There is thus no possibility of the unconscionable result against which the *Wieman* decision was aimed, viz., preclusion from legitimate employment opportunities by innocent and unknowing memberships and associations of one's past. And if the member knowingly continues his membership, he is properly subject to the sanctions. See *Adler v. Board of Education*, 342 U.S. 485; *Garner v. Los Angeles Board*, 341 U.S. 716; *Gerende v. Election Board*, 341 U.S. 56.

Nor is petitioner's second due process contention (*supra*, p. 205)—i.e., that based on its reading of

Adler v. Board of Education, 342 U.S. 485—any more tenable. If we correctly understand the contention, it is that, after an organization has registered as a Communist-action organization, thereby admitting its character as defined in Section 3(3), or after it has been formally found to be such an organization by a Board finding which has been judicially reviewed and sustained, each member of the organization must be afforded an opportunity personally to rebut the organization's own estimate of its character, or the judicially affirmed Board finding with respect thereto, before any member-sanction can be made applicable to him on account of his continued membership. Nothing in the *Adler* decision, we submit, requires so strained a result. On the contrary, the organization is the representative of all its members as to the character of the organization. Therefore, when the organization registers or is ordered to register, the sole remedy of any member is to resign.

3. *The sanction provisions do not make of the Act a bill of attainder*

Petitioner also contends (Br. 63-72) that the sanction provisions make of the Act a bill of attainder, forbidden by Article I, § 9, clause 3, of the Constitution. The Act, it says, "imposes various sanctions on the organization identified by the registration order and on its members" after giving the organization "only an administrative hearing, not a judicial trial" and thus, allegedly, "meets the definition of a bill of attainder" (Br. 63).

A bill of attainder is a legislative act which inflicts punishment without a judicial trial on named individuals or on easily ascertainable members of a group for past conduct. *Cummings v. Missouri*, 4 Wall. 277, 323; *Ex parte Garland*, 4 Wall. 333, 377; *United States v. Lovett*, 328 U.S. 303, 315-317; *American Communications Assn. v. Douds*, 339 U.S. 382, 413-414; *Garner v. Los Angeles Board*, 341 U.S. 716, 722. Petitioner's attempt to depict itself as a possible victim of a bill of attainder, by referring to an order directing an organization to register as "outlaw[ing] the organization and thus prohibit[ing] it from engaging in any future activity," comparable to "execution of an individual," (Br. 65; cf. Br. 66), is unavailing. The punishment inflicted must be visited on individuals.

For a statute to constitute a bill of attainder, it is also necessary that there be *punishment* and that the conduct punished be *past* conduct. *American Communications Assn. v. Douds*, *supra*, 339 U.S. at 413-414. The punishment inflicted, however, need not necessarily be punishment in the usual sense of fine or imprisonment. It may consist of deprivation of the privilege of pursuing a certain profession (*Ex parte Garland*, *supra*, 4 Wall. at 377), or in some circumstances of working for the Government (*United States v. Lovett*, *supra*, 328 U.S. at 316), or, in general, of "any rights, civil or political, previously enjoyed," depending upon "the circumstances attending and the causes of the deprivation." *Cummings v. Missouri*, *supra*, 4 Wall. at 320; *Garner v. Los Angeles Board*, *supra*, 341 U.S. at 722. Yet it is settled that

not all disabilities constitute punishment. This Court has recently held that whether a statute is a bill of attainder depends upon the purpose of the statute. See the opinion of the Chief Justice in *Trop v. Dulles*, 356 U.S. 86, 96:

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If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature.

See also *Flemming v. Nestor*, 363 U.S. 603, 613-616, and the opinion of Mr. Justice Frankfurter in *De Veau v. Braisted*, 363 U.S. 144, 160.

Applying these principles to this Act, there can be no question of its being a bill of attainder. First, under the Act, after an organization has either voluntarily registered with the Attorney General or been finally ordered to do so by the Board, its members incur the various disabilities and restrictions which have been called sanctions. That is, certain avenues of employment are foreclosed to them, they are no longer free to use passports, and, if aliens, they become excludable, deportable, and ineligible for citizenship. These restrictions were clearly not imposed by Congress for the purpose of punishing the members of Communist-action organizations. Instead, as Section

2 of the Act makes clear, Congress intended to accomplish the "legitimate governmental purpose" of checking the serious worldwide Communist danger insofar as it was working through organizations within the United States. And, as we have shown (*supra*, pp. 172-204), the restrictions were all reasonably related to this objective.

Second, the "members" on whom these sanctions are imposed are not past or former members of the organization, but *current* members. The sanctions have no retroactive effect; they apply only to persons who continue their membership in the organization after it has registered or been finally ordered to do so, or who become members thereafter. *Bona fide* termination of membership precludes the sanctions' taking effect as to him from that time on. Thus, the *Douds* decision, upholding the non-Communist oath provision against a similar attack, is precisely applicable to the case at bar. Just as "there is no one who may not, by voluntary alteration of the loyalties which impel him to action, become eligible to sign the [non-Communist] affidavit" (339 U.S. at 414), so too there is no present member of petitioner who may not, by a voluntary and good-faith termination of that membership prior to the time when the order directing registration becomes final, avoid the restrictions and disabilities imposed by the Act. For this reason, regardless of whether those restrictions and disabilities be deemed of a penal nature or not, the Act lacks one of the essential characteristics of a bill of attainder, *viz*, the punishment of *past* action or conduct. See

Sutherland, *Freedom and Internal Security* (1951), 64 Harv. L. Rev. 383, 403.

III

THE COURT BELOW CORRECTLY SUSTAINED THE BOARD'S ULTIMATE FACTUAL FINDING THAT PETITIONER IS A COMMUNIST-ACTION ORGANIZATION AS DEFINED IN THE ACT

INTRODUCTION: SUMMARY OF MODIFIED REPORT

The findings of fact made by the Board in its Modified Report fill over 230 pages of the printed transcript of record (R. 2413-2644). As stated by the Board: "The evidence in this proceeding traces the entire existence of the Communist Party of the United States, a period of more than 30 years. It has been a satellite of the Soviet Union from its inception" (R. 2642). We discuss below (pp. 232-263) the nature of the evidence underlying the Board's subsidiary and ultimate findings. We give here a summary of the findings of the Modified Report.

Basically, the Board found that a world Communist movement directed, dominated, and controlled by the Soviet Union exists and has as its primary objective the establishment of Communist dictatorships of the proletariat in all countries throughout the world, including the United States (e.g., R. 2509-2510), and also that the Communist Party of the United States practically since its inception has been an active integral part of this world movement (e.g., R. 2509). Thus, the Board concluded that petitioner operates under the direction, domination, and control of the

Soviet Union primarily to advance the objectives of this movement (R. 2644).

The World Communist Movement.—One of the important subsidiary findings of the Board was that the world Communist movement and the Communist Party of the United States adhere to and operate on the basis of "Marxism-Leninism" (R. 2414, 2446-2451, 2453-2456, 2520, 2544, *passim*). "Marxism-Leninism" is a comprehensive compilation of Communist doctrine, general strategy, and tactical operational methods (R. 2414-2453), based on the theories of Marx and Engels as implemented primarily by Lenin and Stalin (R. 2415). It prescribes common programs for accomplishing violent revolutions for the ultimate purpose of establishing the dictatorship of the proletariat, *i.e.*, Communist dictatorship, throughout the world (R. 2420-2422). While the disciplined Communist Party of each country directs the Communist revolution in that country (R. 2429-2434), the various national parties owe loyalty and allegiance to the Soviet Union and its Communist Party which holds a dominant position (R. 2421-2424). "Marxism-Leninism" gives special attention to the United States as the arch enemy of the Communist movement (R. 2424-2428). The Board concluded that " * * * fulfilling the role of the vanguard Communist Party called for in Marxism-Leninism and the adherence to and practice by an organization of Marxism-Leninism is * * * strong evidence that it is substantially under the domination and control of the Soviet Union, the leader of the world Communist movement and that it operates pri-

marily to advance the objectives of the world Communist movement" (R. 2453).

Having determined the doctrinal content of "Marxism-Leninism" as used, understood, and followed by petitioner, the modified Report next found that a world Communist movement as called for in "Marxism-Leninism" exists in fact and has been effective (R. 2453-2510). The present movement was organized by the Russian Communists when they called for the world revolution after the 1917 revolutions had brought them into control in Russia; the purposes of organizing the world movement were to consolidate and protect the Communist victory in Russia and to foment and aid Communist revolution in any part of the world where it might be successful (R. 2419, 2455-2456). From 1919 until 1943 the movement operated through, in effect, a world Communist Party, called the Communist International or Comintern, which was directed by the Soviet Union with the various Communist Parties throughout the world constituting sections (R. 2456-2485). This particular organizational form was then discontinued because it was no longer required to insure unity and because the open membership of the various Communist Parties in the world Party dominated by the Soviet Union became a hindrance to them in acquiring support (R. 2485-2487).

However, the substance of the world Communist movement, under the hegemony of the Soviet Union,

continued to exist at least until the time of the Board proceeding (R. 2485-2499). In 1947, several European Communist Parties formed the Communist Information Bureau or Cominform as a means of maintaining contact in the world Communist movement (R. 2487-2497). The Board found that working in conjunction with the national Communist Parties the Soviet Union has directed and aided such Parties to acquire governmental power and establish dictatorships in the countries of Eastern and Central Europe and China (R. 2500-2509). In recent years the world Communist movement has been referred to by the various national Communist Parties as the "world camp of peace" or the "camp of peace and democracy" in which the Communist Parties are aligned under the leadership of the Soviet Union to continue the international Communist revolution or "struggle against imperialism" (R. 2493-2499, 2551-2554).

The Board noted that the existence of the world Communist movement and the objectives of the movement to overthrow present non-Communist governments and to establish subservient Communist totalitarian dictatorships are legislative facts found by Congress in the Act itself. The Board, however, itself found (on the basis of the evidence before it) the existence of the world Communist movement substantially as found by Congress in Section 2 of the Act (R. 2453-2454).

The Communist Party of the United States.—Petitioner joined and became a part of the Communist International shortly after it was constituted in 1919 (R. 2459). In doing so petitioner adopted a resolution in its 1921 convention endorsing the twenty-one "Conditions of Admission to the Communist International" (R. 2461, 2139, A7G. Ex. 8). These conditions included the requirement that national parties become "sections" of the International and that "[a]ll the resolutions of the congresses of the Communist International, as well as the resolutions in the Executive Committee are binding for all parties joining the Communist International. * * * Those members of the party who reject the conditions and the theses of the Third International, are liable to be excluded from the party" (R. 2139). Petitioner also bound itself to adopt the Communist principle of democratic centralism or control from the top; to maintain a controlled Party press; to follow in its propaganda and agitation the line of the Comintern; to maintain programs in accordance with the resolutions of the Comintern; to support and defend the Soviet Union; and to work for the revolutionary overthrow of capitalism (R. 2461-2463). While petitioner, in 1940, disaffiliated organizationally from the Communist International, the Board found that the purpose was to avoid a federal law and was done to preserve, rather than to end or change substantially, petitioner's role as a part of the international Communist movement (R. 2515).⁷⁶ Thus, petitioner has continued to adhere to

⁷⁶ While petitioner did not become a formal member of the

the programs and conditions of the world Communist movement.

The Board found that the name of petitioner--the Communist Party of the United States of America"--and petitioner's organization, including reorganizations that have taken place, were the result of directives or statements from the international Communist leadership (R. 2510-2522). Organizationally, petitioner practices the iron discipline and "democratic centralism" required for any Communist Party anywhere in the world (R. 2528-2538). Included in "democratic centralism" is strict control from the top at both the national and international levels (R. 2529). Consistent with Marxism-Leninism, petitioner has operated secretly in many respects (R. 2613-2631).

Before World War II, the Soviet Union provided training in Moscow for many of petitioner's outstanding workers and leaders (R. 2596-2603). This training included instructions in the policies, strategy, and tactics of the world Communist movement and in methods for carrying out the proletariat revolution,

Cominform after its organization in 1947, petitioner used and relied upon important Cominform documents (R. 2516; see, e.g., R. 775).

"The change from "Communist Political Association" to petitioner's present name in 1945 was not a mere matter of form. It was considered an integral part of petitioner's major reorganization in that year resulting from the criticism of Jacques Duclos, an important French Communist (R. 2520-2521; see *infra*, p. 235). As an article in petitioner's official organ stated, "It is necessary to resume the name *Communist Party* to restore the correct Marxist concept and role of a vanguard party of the working class" (R. 2521).

including guerrilla warfare, sabotage, the arming of supporters, and seizure of food and supplies (R. 2599, 2602-2603). Among the Party members so trained were petitioner's highest officer and other top officials and leaders at the time of the Board hearing. These officials had held important positions in the Party for many years, had held positions in the organized world Communist Party in addition to their positions with petitioner, and had visited the Soviet Union on Party business (R. 2522-2525, 2597-2603). They in turn have indoctrinated petitioner's membership, and operated the Party in this country in accordance with instructions received while in the Soviet Union (R. 2523, 2602-2603). Some of these same leaders of petitioner while attending a Communist conclave in the Soviet Union in 1935 took an oath of fealty to Stalin, the then head of the Soviet Union, and have never repudiated it (R. 2636-2637).

As part of its organizational structure, petitioner maintains a Communist press which follows specific directives from the Communist International and the rules of "Marxism-Leninism" (R. 2538-2543). The Modified Report contains numerous instances from the Party's official organs which demonstrate their use as a means of spreading Communist propaganda in this country and particularly in aiding the Soviet Union (*e.g.*, R. 2539-2541, 2546-2547, 2550, 2610, 2632-2633). Besides the Party press, petitioner maintains schools and devotes part of its membership meetings to teaching and advocating the various doctrines, programs, strategy, and tactics of the world Communist

movement (e.g., R. 2446-2451, 2518-2521, 2523, 2549, 2555, 2568, 2570-2571, 2626, 2641).

The Board considered the positions advanced by petitioner throughout its history and continuing up to the time of the hearing and found that petitioner has invariably supported the policies of the Soviet Union (R. 2580-2590). Petitioner has supported the positions of the Soviet Union in at least forty-five international questions of major importance (R. 2581). In fact, petitioner has immediately conformed its policies to reversals in those of the Soviet Union (R. 2583-2585, 2590). Translations received by petitioner of articles in the official Soviet Union press, such as *Pravda*, provide a source of directives to be followed by petitioner in this country (R. 2541-2542).

Petitioner, as required by Marxism-Leninism, has throughout its existence aimed at the overthrow of capitalist or "imperialist" nations, particularly the United States, and has actively supported the Soviet Union for this purpose (R. 2543-2558, 2631-2642). The teaching and advocacy of the overthrow of "imperialist" governments includes the use of force and violence, if necessary (R. 2631-2633). In order to overthrow the United States, petitioner urged the study of "Marxism-Leninism," as a guide to action, in the classics, schools, and discussion groups. This instruction in support of the Soviet Union included the concept of "just" and "unjust" wars (R. 2640-2641, 2555-2558). According to this doctrine, Communists will not bear arms in a war against the Soviet Union; in the event of a war between the Soviet Union and

the United States, petitioner's members are to work for the defeat of the United States; and, in the event of a war between two "imperialist" countries the Communist role is to work for the destruction of both, thus leaving the Soviet Union a clear path for future victory (R. 2557, 2640-2641).

The Modified Report reviews petitioner's current activities in the fields of labor, youth, and minority groups and finds that these programs and activities have continually followed the policies of the Communist International and the Soviet Union (R. 2558-2580). Petitioner attempts to infiltrate these groups and take them over are for the purpose of effectuating the policies of the Soviet Union and furthering the world Communist movement (R. 2580).

In addition to its recognition and acceptance of the Soviet Union as the leader of the world Communist movement and its activities in support and defense of the Soviet Union, the Board found that petitioner was aligned with the other Communist Parties in the movement. During its open membership in the Communist International, petitioner carried out the task of supervising the Communists in Canada, Cuba, Mexico, and Central America (R. 2458-2459). In 1939, petitioner joined with the Communist Parties of France, Great Britain, and Germany in adopting a resolution for use of *History of the Communist Party of the Soviet Union*, a basic text for teaching Marxism-Leninism which was still used as such at the time of the Board proceeding (R. 2450-2451). In 1945, petitioner's most recent reorganization took place following a statement that it should reorganize,

issued by the head of the Communist Party of France purporting to express the views of European Communists (R. 2518). Petitioner's own leader, William Z. Foster, praised the so-called "People's Democracies" in Central and Eastern Europe as correct forms of the proletarian dictatorship and as following the fundamentals laid down by the Communist International and by Marxism-Leninism (R. 2506-2509). After the Chinese civil war commenced in 1948, petitioner urged full support of the Chinese Communists, sent congratulatory and cooperative messages to the Communist Party of China and its leader Mao Tse-tung, and used the Communist revolution in China as an example to inspire Communists in the United States (R. 2501-2503). Pledges of full solidarity and cooperation were received by petitioner in December 1950 from thirty-one Communist Parties throughout the world (R. 2498-2499, 2606-2613). The message from the Soviet Union was treated by petitioner as of particularly great importance (R. 2613). Many of the communications from other Communist Parties affirmed of the leadership role of the Soviet Union in "united proletarian internationalism" (R. 2499).

A. THERE IS NO OCCASION FOR A SECOND JUDICIAL REVIEW OF THE BOARD'S FACTUAL FINDING THAT PETITIONER IS A COMMUNIST-ACTION ORGANIZATION

The evidence in this proceeding consists of more than 14,000 typewritten pages of testimony from 19 witnesses (R. 2412, 2646-2650), and more than 500 exhibits. Its presentation consumed more than 14 months (R. 2406-2407). The exhibits consisted of copies of official Communist Party documents, includ-

ing reports made by Party leaders to official Party boards, committees, and other groups, study and teaching materials used in Party schools and training sessions, resolutions and programs adopted by the Party and its leadership, and various authoritative Party writings. They also consisted of copies of official publications and material issued by the Soviet Union (see, *e.g.*, R. 1499-1798). The oral testimony covered to a large extent Party conduct and activities participated in by, or otherwise within the personal knowledge of, the witnesses. Sixteen of the witnesses for the Attorney General were former members of the Communist Party (R. 2646). Twelve had been members until 1945 or later, four as late as 1952 (R. 2646-2650).⁷⁸ Most of the Party member-witnesses had held leadership or functionary positions in the Party; had attended and taught in Party schools or other training sessions; and had done organization and other work for the Party (R. 2646-2650).

The specificity and first-hand knowledge of the Attorney General's witnesses were noted by the court of appeals, and the testimony of witness Philbrick was summarized by the court as an illustration (R. 2126-2128). As stated by the court, Philbrick's entire period of membership in the Communist Party, some five years, was after the disaffiliation of the Party from the International. His testimony, based in large part on what he had been taught in Party classes, in-

⁷⁸ The Board's hearings for taking evidence started in April 1951 and extended until July 1952 (R. 2406-2407). The testimony of three other witnesses was struck on remand from this Court (R. 2411).

cluded statements that the basic objective of the Party was to establish a Soviet state in the United States following the dictates and methods laid down by Marxism-Leninism (R. 2126-2128).

Another illustration of the current and first-hand knowledge of the Attorney General's witnesses is John Lautner, who was a member of the Party from 1929 until 1950 (R. 2648). He was an organizer in Party sections and districts, director of a Party training school, and member of the Party's National Review Commission (R. 2648). He testified to the use in Party training classes as late as 1947, 1948, and 1949 of the *Program of the Communist International* as laying down the strategic aims of the Communist Parties (R. 2447) and to the influence exercised over the Communist Party of the United States by foreign Communist representative Gerhardt Eisler (R. 2526). Lautner identified the leadership of the world Communist movement as the rulers of the Soviet Union and was taught as a Party functionary that the basic objective of the movement was to bring about the downfall of imperialism and of the United States as the leading imperialist country (R. 2549). He testified that a message sent by petitioner to Joseph Stalin in 1949 was in reality a reaffirmation of the Party's loyalty and a further acknowledgment of Stalin's leadership of the world Communist movement (R. 2637-2638).

Petition presented only three witnesses and 92 exhibits. Two of the witnesses were top officials and the other a member who was called as an expert (R. 2650-2651). The Board found that there was "a

significant lack of rebuttal" by the Communist Party on the "multiplicity of specific conversations and events put in evidence by [the Attorney General] at which witnesses available to [the Communist Party] were present" (R. 2412-2413).

A unanimous Board found, on the basis of the "overwhelming weight of the evidence" (R. 132 [2042]; see also R. 133 [2044]), that petitioner is a Communist-action organization as defined in the Act and, as such, required to register. The Board presented the grounds of this finding, and the subsidiary findings on which it rests, in an exhaustive report which also appears in the record in annotated form, i.e., with supporting references to the testimony and exhibits (R. 1-133 [1804-2044]). After remand by this Court, the Board, in its Modified Report, expunged from the record the testimony of three witnesses, but found, after thorough reconsideration of the remaining evidence (no new evidence was introduced),⁷⁹ "that the evidence establishes beyond doubt that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement * * * and operates primarily to advance the objectives of such world movement * * *" (R. 2644). Therefore, the Board reaffirmed its prior determination that petitioner is a Communist-action organization as defined in the Act (R. 2644). On the new remand from the court of ap-

⁷⁹ Attorney General's witness Markward was recalled merely to test the credibility of her original testimony (R. 2225).

peals, the Board, after striking certain evidence and reevaluating the entire record, found in its Modified Report on Second Remand that the findings in the Modified Report were established by a "preponderance of the evidence," particularly the ultimate finding that petitioner is a Communist-action organization (R. 2402). In the Modified Report, as in its original Report, the Board,⁸⁰ under appropriate headings and subheadings, summarized the evidence on both sides; where issues of credibility involved important points, the Board recorded its position, and where there were conflicts in the testimony on particular issues, the Board resolved them.

The court below recognized that the statutory "preponderance of the evidence" test in Section 14(a) of the Act imposed "a less stringent restriction upon the function of judicial review than is customary in such statutes"⁸¹ and that "[b]y the same token it imposes

⁸⁰ The Modified Report on Second Remand (R. 2375-2402, unlike the Modified Report, does not include a complete new analysis of the evidence and the findings based on this evidence. Rather, the former Report discusses only the effect of the court of appeals' order and subsequent proceedings before the Board on the findings of the Modified Report. It therefore constitutes, in effect, an amendment to the Modified Report.

⁸¹ Preponderance of the evidence means the greater weight of the evidence. See *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266; *General Foods Corp. v. Brannan*, 170 F. 2d 220, 223-224 (C.A.7). The usual rule is that the findings of the administrative agency, if "supported by substantial evidence," shall be final. See, e.g., Administrative Procedure Act, Section 10(e)(5), 5 U.S.C. 1009(e)(5); National Labor Relations Act, as amended, 29 U.S.C. 160(e).

a laborious task upon the reviewing court" (R. 2126). See 96 Cong. Rec. 13764-13765; cf. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 492; *General Foods Corp. v. Brannan*, 170 F. 2d 220, 223-224 (C.A. 7); *Great Western Food Distributors v. Brannan*, 201 F. 2d 476, 479 (C.A. 7), certiorari denied, 345 U.S. 997. Accordingly, in discharge of this heavy responsibility for review, the court devoted more than a third (R. 2125-2153) of its original 76-page opinion to a discussion and analysis of the evidence on both sides. In its two subsequent opinions, the court of appeals again considered the evidence before the Board (R. 2653-2656, 2700-2701, 2705-2706). The court's original opinion, while not attempting to "comment upon the evidence on each minute issue of fact" or to "evaluate particles of proof," did "indicate the extent, nature, particularity, and personal character of the testimony presented by the Government, and the nature and extent of the evidence presented by [petitioner], including the character of both its denials and its explanations" (R. 2126). The court concluded from its exhaustive review that two of the Board's eight subsidiary findings should be modified (*infra*, p. 276), but that otherwise all of the Board's findings, including its ultimate and decisive finding that petitioner is a Communist-action organization as defined in the Act, were "supported by the preponderance of the evidence" (R. 2152-2153). This determination was reaffirmed by the court in both its subsequent decisions (R. 2655, 2701, 2706). In affirming the Second Modified Report, the court

held that its "findings are amply supported" (R. 2701) and that "[t]he preponderance of all the evidence supports the conclusion of the Board" (R. 2706).

This being the present posture of the litigation, we submit that there is no occasion for the Court to subject the lengthy transcript to a second—indeed, a fourth—judicial review for the purpose of reappraising and reevaluating the evidence and determining its sufficiency to support the Board's findings and order. Section 14(a) of the Act provides that, where review of a Board order is sought:

The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari

* * *

Relying on a similar provision in the Taft-Hartley Act, this Court in *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502, held that "Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders," and concluded (*id.*, pp. 502-503):

The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

This view was emphatically reiterated and applied in *National Labor Relations Board v. American Insurance Co.*, 343 U.S. 395, 409-410; *Federal Trade Commission v. Standard Oil Co.*, 355 U.S. 396, 397-404; and *Peurifoy v. Commissioner*, 358 U.S. 59, 61; cf. *Federal Communications Commission v. Allentown Broadcasting Co.*, 349 U.S. 358, 364-365.

We suggest that, under the Subversive Activities Control Act, Congress charged the courts of appeals and not this Court with the primary responsibility for ascertaining that the findings of the Board are supported by a preponderance of the evidence. This should lead this Court to do no more than to satisfy itself that the court of appeals made a fair assessment of the record on the issue of the sufficiency of the evidence. That the court of appeals did so, we submit, is evident from its opinions.

B. THE COURT BELOW CORRECTLY AFFIRMED THE BOARD'S FINDINGS AS BASED ON THE PREPONDERANCE OF THE EVIDENCE

The Board found that "the evidence establishes beyond doubt that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement" and "operates primarily to advance the objectives of such world movement" (R. 2644). These findings brought petitioner within the Section 3(3) definition of a Communist-action organization and made it subject, as such, to the mandatory registration requirements of the Act. In this sense these findings may be described as the ultimate or decisive findings of the Board. In

addition to these ultimate findings, the Board made subsidiary findings keyed to the eight paragraphs under Section 13(e), which lists the various factors required to be taken into consideration by the Board in arriving at its ultimate determination (see *supra*, pp. 139-140). Thus, for example, the Board made a finding, corresponding to Section 13(e)(2), that petitioner's "views and policies do not deviate from those of the Soviet Union" (R. 2590). And so on with respect to the other paragraphs of Section 13(e).

The evidence of record is elaborately summarized in the Modified Report of the Board, which contains supporting references. The original Report—which, with several significant exceptions, is substantially the same as the Modified Report—has itself been carefully reviewed and summarized in the original opinion of the court of appeals, which on the basis of its "laborious" study of the record affirmed the order of the Board as supported by "the preponderance of the evidence." We have summarized the Modified Report, *supra*, at pp. 212-221. Therefore, we shall confine ourselves in this portion of the brief to a general discussion of the evidence amply supporting the Board's finding.

A more extended discussion of the sufficiency of the evidence does not appear to be required in this case, for petitioner makes no attempt to assay the significance of any of the proof it attacks from the standpoint of the sufficiency of the evidence as a whole. Its attack, rather, is concentrated on the minutiae of the evidence, frequently lifted out of context. As the

court of appeals stated in its most recent decision (R. 2705):

By concentrating on segments of the evidence and expanding their importance by discussion, to the exclusion of all the rest of the evidence, the Party seeks to have us believe there are no other significant features in the record.

This fragmentary approach overlooks the fact that, as the court below has remarked, "all relevant facts are cumulative in delineating a completed whole" (R. 2138). One knows "fish from fowl," to use the court's figure (*ibid.*), as a result of simultaneous consideration of an accumulation of evidence, seen from an over-all view. Petitioner's approach to the evidence ignores the fact that, to change the figure, an unmistakable pattern or mosaic can emerge from numerous fragments having little individual significance. "When the parts are put together," the court below observed, "the picture is clear and forceful" (R. 2152). Cf. *Interstate Circuit v. United States*, 306 U.S. 208, 223-226.

Viewed from the standpoint of the record as a whole, petitioner's criticisms are but pinpricks at the evidence, often relating to matters having obviously minor bearing on the ultimate issue. The fallacy of this method is shown by the fact that petitioner, by hacking away at the individual trees and ignoring the forest, has reached the astounding conclusion that it is impossible rationally to conclude that the Commu-

nist Party of the United States is the pawn of the Soviet Union and exists to further the objectives of the world Communist movement. In the guise of an elaborate factual and statutory argument, petitioner is simply denying that reasonable men can characterize it as has been done many times by all three branches of our government, by countless scholars throughout the world, by a multitude of foreign states, and by most of the press of the free nations. And this argument is made even though the members of the Board, who saw and heard and questioned the witnesses on both sides and observed their demeanor on the witness stand, had the best seats of vantage from which to see the development of the picture which the evidence, viewed as a whole, so clearly portrays.

We deal below with petitioner's claim that the evidence does not support the Board's findings under the criteria for Communist-action organizations contained in Section 3(3) (Br. 96-104), its attack on the evidence relating to the evidentiary considerations listed in Section 13(e) (Br. 111-124), its contention that the Board's conclusion that petitioner is a Communist-action organization is based on evidence of conduct which has been discontinued (Br. 105-111), and its attack on the legislative determination, underlying the Act, that there exists a world Communist movement as described in Section 2 (Br. 124-126).

1. *The Board and the court below correctly construed and applied the evidentiary considerations enumerated in Section 13(e) of the Act*⁸²

Congress, in Section 13(e) of the Act, directed the Board, in "determining whether any organization is a 'Communist-action organization,'" to "take into consideration" the "extent to which" the organization or its leaders do certain things. We have previously indicated the error in petitioner's assumption that these evidentiary factors are "tests" of whether an organization fulfills the Section 3(3) definition of a Communist-action organization as distinguished from matters, as the statute plainly indicates, "to be taken into consideration" and evaluated by the Board in making its ultimate determination (*supra*, pp. 139-140). A brief discussion of petitioner's attack on the proof adduced with respect to four of these considerations will expose the insubstantial nature of petitioner's factual contentions when weighed against the obvious purpose of the statutory guides and the thrust of the evidence, considered as a whole.⁸³

⁸² We discuss the evidence as to the Section 13(e) evidentiary considerations first because these considerations provide a convenient method for analyzing the evidence. As we have shown (pp. 139-140), the criteria in Section 3(3) are the decisive standards which must be met to prove that an organization is a Communist-action organization.

⁸³ Petitioner's contentions with respect to the proof relating to the remaining four evidential factors, which we do not discuss, are similarly insubstantial and, in view of the force of the findings which we review, of cumulative significance only. Moreover, the Board did not mention its subsidiary findings on these other four evidentiary considerations in making its ultimate determination that petitioner is a Communist-action organization. The court below modified the Board's findings with respect to "secret practices," but correctly concluded that this

(a) *The directives and policies consideration*

Section 13(e)(1) directs the Board to take into consideration, in determining whether an organization is a Communist-action organization, the extent to which its policies are formulated and carried out and its activities performed "pursuant to directives or to effectuate the policies of" the foreign government or organization which directs and controls the world Communist movement. The Board devoted much more than one-half of its Modified Report (R. 2414-2580) to a review and analysis of the evidence pertaining to this factor. It found, using the substance of the language of Section 13(e)(1), that "[petitioner's] policies, programs, and activities were originally formulated and carried out pursuant to directives of, and to effectuate the policies of, the foreign leadership of the world Communist movement," that petitioner "is still pursuing policies enunciated by the Soviet Union through the Communist International," and that petitioner's "policies, programs, and activities regarding trade unions, youth, and national minorities have as their fundamental purpose to effectuate the policies of the Soviet Union and to further

modification did not require a remand to the Board in view of the overwhelming nature of the findings which were sustained (R. 2701; see *infra*, pp. 276-283). The Board did not rely heavily on the evidence relating to "financial aid," since it related, with but one exception, to the pre-1940 period (R. 2596). Similarly, the Board found, with respect to the "instruction and training" factor (Br. 118), that there is "no credited evidence showing training of [petitioner's] members in the Soviet Union subsequent to the outbreak of World War II" (R. 2602). As to reporting, the Board found only that petitioner "upon occasion reports to the Soviet Union and its representatives" (R. 2613).

the world Communist movement" (R. 2579-2580). These findings are supported by more than ample evidence.

As we have indicated, petitioner began its history by joining, and becoming the United States section of, the Communist International, or "Comintern," an organization of Communist Parties throughout the world with headquarters in Moscow and completely controlled as to policy and activity by the Soviet Union (R. 2458-2460). Its roots were thereby planted in the Soviet Union and it grew and matured under especially close supervision by and assistance from the Soviet Union. In numerous instances the Soviet Union directed important changes (often through representatives of the Communist International (R. 2525-2528)) in petitioner's organization or policies. These included the amalgamation, pursuant to Soviet directives, of various Communist factions in the United States into the one, single Communist Party and the selection by Soviet leaders of the individuals to serve as petitioner's leaders (R. 2511-2512). Among these individuals was William Z. Foster, who rose to become petitioner's leading official and held that position at the time of the Board hearings (R. 2522-2523). As a resolution passed by petitioner's 1940 convention states (see *supra*, p. 55), petitioner left the Communist International in 1940 solely in an effort to avoid registration as an organization subject to foreign control under the Voorhis Act (R. 2512-2515). Thus petitioner's policies and role in the world Communist movement remained essentially the same (R. 2514-2515). Indeed, Earl Browder, petitioner's top official from 1930 to 1945, stated that all ma-

for policies put into effect by petitioner during that time were with the previous knowledge, consent, and active support of the decisive interested Communist leadership (R. 2521-2522).⁴⁴ And in 1945, petitioner completely reorganized—expelling Earl Browder, petitioner's top leader and substantially changing its structure—as the result of criticism by Jacques Duclos in an official French Communist organ⁴⁵ (R. 2518-2522).

Both before and since 1940, petitioner has followed and attempted to effectuate the policies of the Soviet Union. For example, it has taught and advocated the Marxist-Leninist theory of "imperialism" which teaches the overthrow of imperialist governments by the use of force and violence, if necessary. Thus, pe-

⁴⁴ Petitioner correctly states (Br. 117) that the Board made no finding that petitioner has continued to receive directives from the Soviet Union after its disaffiliation from the Communist International. Petitioner argues (Br. 117) that the Board therefore erred in using the finding as to Soviet directives prior to 1940 to show that petitioner is currently controlled by the Soviet Union (R. 2642-2644). It seems obvious, however, that the finding of pre-1940 directives has considerable probative value, when combined with other findings such as that petitioner has continued to support and effectuate the policies of the Soviet Union; that petitioner still follows with complete fidelity the principles and current interpretations of Marxism-Leninism, etc. (see *infra*, pp. 242-244, 236-240). Moreover, petitioner's immediate response to the Duclos criticism constitutes significant post-1940 evidence.

⁴⁵ Duclos' criticism first appeared in the April 1945 issue of "Cahiers du Communisme", a publication of the French Communist Party. It was printed in the Daily Worker on May 24, 1945 (R. 1137). Nine days later, petitioner's National Board drafted a resolution criticizing the Browder period as a notorious revision of basic Marxist-Leninist theories (Daily Worker, June 4, 1945, p. 4). On June 18-20 the National Committee stripped Browder of his functions, and appointed a three-member Secretariat to rule until the National Convention in July 1945 (R. 1143-1149; Daily

petitioner has taught support of the Soviet Union rather than the United States, not only at the present but in event of war (see *supra*, pp. 219-220). Similarly, following the principles of Marxism-Leninism, the Communist International, and the Soviet Union, petitioner's major programs have been in the area of trade unions, minorities, and labor (R. 2558-2580). The evidence shows that, contrary to petitioner's contention (Br. 117), these programs were carried out not merely to win popular support but for the purpose of implementing the proletariat revolution (*e.g.*, R. 2562-2563, 2564, 2565, 2569, 2572, 2575).

Underlying all the evidence showing that petitioner followed the directives of the Soviet Union prior to 1940, and has continued its efforts to effectuate its policies since that time, is its complete and unquestioning adherence to the doctrines of Marxism-Leninism.⁸⁶ The Board therefore traced the history of

Worker, June 22, 1945, p. 2). At the Convention (July 26-28) the delegates "unanimously" (except for Browder's one vote) voted to reconstitute the Communist Party (R. 1152; Daily Worker, July 30, 1945, pp. 2, 4).

⁸⁶ The Board noted that "the merits of the theory of Marxism-Leninism, as such, is [sic] not an issue in this proceeding" (R. 2414) and that (R. 2416-2417):

"* * * there may be, and probably are those who subscribe to portions of Marxism-Leninism, *e.g.*, the labor theory of values and public ownership of the means of production, and yet would advance toward their objective within the principles of the Constitution. But that is not this [petitioner]. It at no time asserts it embraces only isolated portions of Marxism-Leninism, such as those just specified. It espouses Marxism-Leninism in its totality and then proceeds to the position that in so doing it nevertheless embraces the Constitution and is an independent, domestic political organization.

"As the evidence now to be discussed will show, [petitioner's] adherence to Marxism-Leninism and its operations on the basis

Marxism-Leninism. After explaining how "Marxism" originated with Marx and Engels in the middle of the nineteenth century, and after stating the basic tenets of that philosophy (R. 2417-2418), the Board pointed out that Lenin "adapted Marxism to Russian revolutionary purposes" (R. 2419) and that "Stalin gave the Marxist-Leninist ideas a practicality which developed somewhat differently from Marxist theoretical schemes" (*ibid.*). The Board noted that, since Marx and Engels, the content of Marxism-Leninism has been interpreted mainly by Soviet authors who themselves are the leaders of the Communist International, Soviet Communist Party, and the Soviet Union (R. 2415).

The record shows and the Board found that the Soviet leaders integrated into Marxism-Leninism the principle that the Soviet Union is the "leader of the world Communist movement" (R. 2453). For example, in *Foundations of Leninism*, a basic document in the Marxism-Leninist "Classics," Stalin emphasized that "the Russian proletariat [is] the vanguard of the international revolutionary proletariat" and that "the centre of the revolutionary movement was bound to shift to Russia" (R. 2421). Furthermore, he stated, in the conflict between the "camp of peace and democracy" and the "camp of imperialism," the former is headed by the Soviet Union (R. 2426-2427). Similarly, "democratic centralism" is interpreted by the *Programme of the Communist International*, another important Marxist-Leninist work, to mean (R. 2433):

thereof exclude adherence to the Constitution as the Party proclaims."

This international Communist discipline must find expression in the subordination of the partial and local interests of the movement to its general and lasting interests and in the strict fulfillment, by all members, of the decisions passed by the leading bodies of the Communist International.

The Strategy and Tactics of the Proletarian Revolution emphasizes that, if an imperialist war begins, the interests of workers of all countries demand that they come to the defense of the Soviet Union (R. 2437).

The United Front, a work written in the late 1930's, similarly states (R. 2421-2422):

You cannot carry on a real struggle against fascism if you do not render all possible assistance in strengthening the most important buttress of this struggle, the Soviet Union. You cannot carry on a serious struggle against the fascist instigators of a new world blood bath, if you do not render undivided support to the U.S.S.R. * * *

In view of the role assigned to the Soviet Union by Marxism-Leninism, the Board was clearly correct in concluding that "fulfilling the role of the vanguard Communist Party called for in Marxism-Leninism and the adherence to and practice by an organization of Marxism-Leninism is evidence, and strong evidence, that [an organization] is substantially under the domination and control of the Soviet Union * * *" (R. 2453).

There is no doubt from the record that petitioner assumes the role of the vanguard Communist Party

in the United States and adheres to and practices Marxism-Leninism. Petitioner's own constitution states that it is based on the "principles of scientific socialism, Marxism-Leninism" and its amended answer admitted that Marxism-Leninism is basic to its being (R. 2414). Marxist-Leninist texts were considered by Party leaders in the 1940's to be the very basis of Party policy and were taught to petitioner's members in Party classes (e.g., R. 2447-2450). Throughout the Board's Report are numerous instances of specific programs and activities undertaken by petitioner because they were dictated by Marxism-Leninism and thus by the Soviet Union. See, e.g., R. 2518-2522 as to the most recent internal reorganization in 1945; R. 2558-2580 as to compliance with Marxism-Leninism in petitioner's major programs.

Indeed, the record demonstrates that petitioner supports and teaches the particular tenet of Marxism-Leninism that makes the Soviet Union the controlling leader of the movement. The Attorney General's witness Lautner, a former high Party official and teacher, testified that Marxism-Leninism requires the complete subservience of all Communist Party organizations, including that in the United States, to the Soviet Union (R. 2447, 2433). He stated that he used the *Program of the Communist International* in teaching Party classes in 1947 to 1949 "because the program of the Communist International lays down the strategic aims of the Communist Parties" (R. 2447). And the Attorney General's witness Budenz,

the former editor of the *Daily Worker*, testified (R. 2448):

I referred to Marxism-Leninism. I referred to Stalin as the leader, teacher and guide, things of that sort, which was Aesopian to the extent that it presented Stalin as the leader, teacher and guide, but didn't explain that he completely controlled the Communist movement, although I could have done it because Bittelman had stated in *Milestones* that Stalin was the leader, the Communist Party of the Soviet Union was the leader.

In sum, Marxism-Leninism is relevant in two respects to the directives and policies consideration of Section 13(e)(1): first, by following the principles of Marxism-Leninism, as interpreted by Stalin and his successors, petitioner is in effect acting pursuant to directives of the government or organization directing the world Communist movement;⁸⁷ and, second, by adhering to Marxism-Leninism, petitioner agrees to support fully the Soviet Union, which Marxism-Leninism makes the leader of world Communism, and thus to effectuate the policies of the government directing the world Communist movement.

⁸⁷ The Marxist-Leninist "Classics," as well as the more recent Soviet documents which purport to interpret them, contain instructions and directives to Party members as to how they should conduct themselves and what action they must take in working toward the goal of the dictatorship of the proletariat in all sorts of tactical situations in the "ebb and flow" of events (R. 2434-2453).

(b) *The non-deviation consideration*

The Board found that "the views and policies of [petitioner] throughout its history invariably coincide with the views and policies of the Soviet Union." Moreover, the Board stated that petitioner "conforms immediately to each reversal in the Soviet Union's views and policies" and concluded that "[petitioner's] views and policies do not deviate from those of the Soviet Union" (R. 2590). The overwhelming evidence supporting this finding is summarized in the Board's Report at R. 2580-2590.

Petitioner does not deny the fact of the identity of its program and policy with that of the Soviet Union. And as we have seen (*supra*, pp. 143-144), proof of the fact of identity is all that is contemplated by Section 13(e)(2). Petitioner's discussion of this consideration (Br. 111-117), therefore, is but a further attack on the relevance of nondeviation as one factor tending to establish foreign domination and control—a contention which we have shown to be without merit (*supra*, pp. 143-144).

Petitioner presses its argument by urging that to establish non-deviation within the meaning of Section 13(e)(2) it must be shown that in each instance the view it shared with the Soviet Union (1) was adopted by it after its adoption by the Soviet Union (Br. 112-114), (2) was itself false or unreasonable and not generally accepted (Br. 114-115), and (3) did not emanate from a common philosophy (Br. 115-117).

The argument is beside the point, for it is obvious that Marxist-Leninist philosophy as implemented by

the Soviet Union may have caused petitioner to adopt views on *specific* issues that were not themselves unreasonable. Such is to be expected. Proof, therefore, that this was the case with respect to selected issues was, as the Board consistently ruled (R. 836-845, 861-864, 1274-1275), not relevant to the question of non-deviation. The point of non-deviation is not that petitioner's views on every issue were necessarily evil in themselves. The point is rather that the fact that a domestic organization, throughout its thirty years' history, has undeviatingly mirrored the views of the foreign power which controls the world Communist movement on every significant aspect of world politics is evidence, to be weighed with all the other evidence, that that foreign power controls the domestic organization and that the domestic organization operates primarily to advance the objectives of the world Communist movement. Petitioner's repeated assertion that such an inference is irrational offends common experience. The inference is an entirely reasonable and natural one.⁸⁸

It is true, as petitioner observed in its original petition for certiorari, that the fact that two persons "both believe that the sum of two and two is four" (Pet. 73) does not give rise to an inference that one controls the other. It is also true that the fact that "two organizations oppose racial segregation" (Br. 114) does not prove that the one is under the other's dominion. But the fact that petitioner, in conformity

⁸⁸ Cf. 96 Cong. Rec. 14532 (observations on this point by Senator Mundt).

with the position of the Soviet Union, denounced Fascism in Nazi Germany as a peace menace until the Hitler-Stalin Pact of 1939, following which it about-faced and, with the Soviet Union, hailed the Pact as an outstanding contribution to the peace of the world (R. 2583; 2145), is evidence of a different character. So is the evidence that petitioner abruptly reversed its attitude toward the Tito government in Yugoslavia on June 29, 1948, following the Soviet Union's bitter attack on that government on June 28, 1948 (R. 2584-2585, 2145-2146).

"Dr. Mosely's⁸⁹ testimony," observed the Board, "traced the continuing stream of international questions upon which both the Soviet Union and [petitioner] have announced a position. He enumerated some 45 international questions of major import, extending over the past 30 years, with respect to which there was, as revealed by his testimony, no substantial difference between the position announced on each by the Soviet Union through its official and controlled organs and that announced by the [petitioner] through its official and controlled organs. * * * [Petitioner's] witnesses were unable to cite a single instance throughout its history where, in taking a position on a question which found the views or policies of the Soviet Union and the United States Government in conflict, the [petitioner] had agreed

⁸⁹ Dr. Philip E. Mosely, Professor of International Relations at Columbia University and Director of the University's Russian Institute, was the Attorney General's expert witness on "non-deviation" (R. 2580-2581).

with the announced position of the United States; nor could they show a single instance when the [petitioner] had disagreed with the Soviet Union on any policy question where both [petitioner] and the Soviet Union have announced a position" (R. 2581, 2588).⁹⁰

Petitioner's contention that the proof of non-deviation failed, because it was not shown as to all of the issues in question that the position held by both the Soviet Union and petitioner was first adopted by the Soviet Union and thereafter announced as the position of petitioner, is equally without substance. As the court below held: "The statutory phrase [non-deviation] refers to identity or coincidence and not to chronological adoption" (R. 2146). Indeed this is the only tenable construction, for Congress could hardly be supposed to have placed upon the Board the impossible task of determining the exact time when a foreign government "first established" (Br. 112) each of its positions on political affairs.

Furthermore, contrary to petitioner's suggestion, a great deal of the non-deviation evidence itself showed that petitioner's adoption of a given position or policy did in fact follow the adoption of that position or policy by the Soviet Union. The sudden reversal of

⁹⁰ The testimony of petitioner's witnesses Gates and Flynn, to which the Board referred, appears at R. 1247-1248, 1299-1300. Both had been members of petitioner's National Committee for many years, the former since 1945 (R. 1199), and the latter since 1938 (R. 1275). Gates, who had been the editor of the *Daily Worker* from 1947 until the time of the hearings (R. 2650), explicitly stated that he could not remember any instance in which the *Worker* had supported the United States in opposition to the Soviet Union (R. 1247).

petitioner's attitude *vis-à-vis* Nazi Germany following the Hitler-Stalin Pact of 1939 and *vis-à-vis* Yugoslavia in 1948, to which we have already referred (*supra*, pp. 242-243), provide two examples of this. A third is petitioner's overnight change of view as to the justness of the war against Germany, which followed the German invasion of the Soviet Union in June 1941 (see R. 2583-2584, 2145).⁹¹

The testimony of petitioner's witnesses, to the effect that all these parallelisms of view between petitioner and the Soviet Union, including the abrupt reversals and re-reversals, were coincidences which sprang from their joint concern for the true interests of the American people, was considered and evaluated by the Board (R. 2588) and was also taken into consideration by the court below in the performance of its review function (R. 2146-2147). In the light of the whole record the conclusion is inescapable that the Board was amply justified in refusing to credit this testimony. Cf. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 715-716.

(c) *The discipline consideration*

Petitioner's contention (Br. 120-122) that the Board and court below misconstrued and misapplied

⁹¹ See also, among other incidents referred to in the Board's Report, the evidence relating to the purge trials of Communist leaders in the Soviet Union in 1937, the Russo-Finnish War, the absorption of Latvia, Estonia, and Lithuania, and the Berlin Blockade (R. 2584-2585). Petitioner points out that, with respect to certain of the "non-deviation" issues, "the domestic exhibits antedated the foreign exhibits" (Br. 113, fn. 48). But obviously the dates of the exhibits do not necessarily reflect the dates when the views and policies evidenced therein were adopted.

the discipline factor of Section 13(e)(6)—i.e., the direction to the Board to consider, in determining whether an organization is a Communist-action group, “the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power” of the foreign government or organization controlling the world Communist movement, or its representatives—is in reality nothing more than an attack on the sufficiency of the evidence supporting the Board’s finding on this point. The Board found that “[petitioner’s] principal leaders and a substantial number of its members are subject to and recognize the disciplinary power of the Soviet Union and its representatives” (R. 2538). The evidence supporting this finding is reviewed in the Board’s Report at R. 2528–2538. The court below in its original opinion reviewed the evidence on this point at (R. 2149–2150)—which was substantially the same as that underlying the Board’s Modified Report—and concluded that the Board’s finding was supported by “a clear preponderance of the proof” (R. 2150). As the court of appeals observed, “[t]he requirement of iron discipline within the Communist movement is one of the basic principles of the movement. It is the ‘democratic centralism’ so vigorously insisted upon by Communist leaders in both speeches and documents” (R. 2149),⁹² and “[i]dentification of the Soviet

⁹² For explanation of the principle of “democratic centralism” and how it works as a disciplinary factor among Communists throughout the world, see the Board’s Report at R. 2431–2434, 2529–2532.

Union as the leader of the world Communist movement is amply shown" (R. 2150).

Petitioner's argument illustrates its mistaken insistence, met with throughout its discussion of the evidence, that the evidence under each of the Section 13(c) categories be considered *in vacuo*, unconnected with and unilluminated by any of the other evidence of record. Thus, after devoting a page (Br. 121-122) to summarizing specific examples, cited in the Board's Report, of expulsions of members from its ranks (including a 1951 expulsion for the offense of urging others to distribute anti-Soviet leaflets), and other instances of the "iron discipline" exercised over its membership, petitioner argues that none of this evidence can "conceivably support the Board's finding that petitioner and its members are subject to Soviet discipline" (Br. 122). Not only does this argument ignore the evidence tending to illuminate these incidents, to which the Board refers (see, *e.g.*, R. 2532-2537),⁹³ but it ignores all the other evidence of record regarding the Soviet Union's position in the world Communist movement.

⁹³ This evidence includes the expulsion of Kornfeder in 1934 for failing to obey the instructions of a Soviet Union representative in the United States, the expulsion of a number of Party functionaries in 1939 for refusing to accept the reversal of Party policy to conform with the Soviet Union's position in signing the Hitler-Stalin Pact, and the expulsion of Earl Browder and a number of his followers in 1945 as a result of the criticism by Jacques Duclos, as spokesman for the world Communist movement (see R. 2518-2521), that they had deviated from true Marxism-Leninism.

Petitioner's argument is also based in large measure on its erroneous assumption, continually reiterated in its brief, that the Board and the court below were required to accept its organizational disaffiliation from the Communist International in 1940 as involving a substantive as distinguished from a merely formal change in its relationship to that body, the Soviet Union, and the world Communist movement. On the contrary, we submit that the Board's (R. 2512-2515, 2643) and the court's (R. 2141-2142) refusal to accept that premise was amply justified by the evidence (see *supra*, pp. 55, 234-235).

(d) *The allegiance consideration*

The Board found that "[petitioner's] leaders and a substantial proportion of its membership consider the allegiance they owe to the United States as subordinate to their loyalty and obligations to the Soviet Union" (R. 2642). The overwhelming evidence supporting this finding is summarized in the Board's Report at R. 2631-2641. The court below, in its original opinion, remarked, on the basis of substantially the same evidence, that "[t]he evidence on this point is long and in great detail" (R. 2151), reviewed it briefly (R. 2151-2152), and concluded that the Board's finding was "amply supported" (R. 2152).

One of the several grounds on which the Board based its finding on this point consisted of petitioner's teachings, consistent with the theory of Marxism-Leninism, concerning the necessity and desirability of forcible overthrow of the United States Government to achieve its ends. After reviewing the evi-

dence on this subject (R. 2632-2635), the Board observed that "[petitioner's] adherence to and implementation of a concept requiring the overthrow of the United States Government by any means, including force and violence, is completely incompatible with, and the exact antithesis of, allegiance to the United States" (R. 2635). In attacking this finding, petitioner (Br. 123-124) asserts that the Board based its conclusion that petitioner advocates the violent overthrow of this Government "primarily on the Board's interpretation of writings of Marx, Engels, Lenin and Stalin, and on the conclusory testimony of informer witnesses," and argues that this Court, in *Schneiderman v. United States*, 320 U.S. 118, "after a study of the same texts," concluded that "adherence to Marxism-Leninism is not inconsistent with attachment to the principles of the Constitution and being well-disposed toward the good order and happiness of the United States" (Br. 123). The contention does not bear analysis.

In the first place, as this Court stated in *Yates v. United States*, 354 U.S. 298, 336-337: "The Court in *Schneiderman* certainly did not purport to determine what the doctrinal content of 'Marxism-Leninism' might be at all times and in all places. Nor did it establish that the books and pamphlets introduced against Schneiderman in that proceeding could not support in any way an inference of criminality, no matter how or by whom they might thereafter be used." Here the Board's findings with respect to petitioner's teachings concerning the use of force and violence does not rest only on the literature of Marxism-Leninism considered in *Schneiderman*. It

was based at least as much on the personal testimony of eight witnesses, who had been members of petitioner, recounting their individual experiences (R. 2633). That testimony established that petitioner "in reality advocates the overthrow of the government of the United States by force and violence" (*ibid.*). The membership of these witnesses "spanned the entire existence of the Party until February 1952" (*ibid.*). Their positions in the Party "ranged from high offices to rank and file Party membership" (*ibid.*). Included among them was a former General Secretary of the Party (Tr. 2647), the highest executive position in the organization (Tr. 1697), and a former managing editor of the *Daily Worker* (R. 2646), the Party's official organ. Truly, as the Board observed, these witnesses "were in a position to know whereof they spoke" (R. 2633). This evidence is confirmed by the conviction of most of petitioner's leaders for conspiring as the Communist Party to advocate overthrow of the Government by force and violence (R. 2635).⁹¹

Furthermore, the literature of Marxism-Leninism to which the Board referred in its Report was not limited to the literature which this Court considered in the *Schneiderman* case. In *Schneiderman*, the relevant literature was that which had been published prior to 1927, the date of Schneiderman's naturalization (320 U.S. at 148). The writings which were published after that date, the Court said, were "entitled to little weight because they were published

⁹¹ Under *Yates v. United States*, 354 U.S. 298, mere advocacy is not enough for conviction; for violation of the Smith Act, proof of incitement to action is required. This Court found such a standard had been met in *Dennis v. United States*, 341

after the critical period" (*id.*, pp. 151-152). Here, on the other hand, the Board had before it all the significant literature of Marxism-Leninism published up to the time of the Board's hearings, which included a span of more than twenty years beyond the "critical period" of the *Schneiderman* case. The literature received in evidence by the Board in this case, a few "illustrative" passages from which the Board quoted in its original Report (R. 118-119 [2017-2020]) and which the Board cited in its Modified Report (R. 2632), leaves no doubt that force and violence was and is advocated as a means of overthrowing all "bourgeois" governments, including that of the United States. Significantly, the two works from which the Board quoted for "illustrative" purposes—Stalin's *Problems of Leninism* (1934) and *Foundations of Leninism* (1932)—were not even in evidence in the *Schneiderman* case.⁹⁶

U.S. 491. Thus, at least, petitioner's "first-string" leaders were convicted of conspiring to incite overthrow of the Government by force and violence.

⁹⁶ The dates given are the dates of the first editions published in the United States. According to petitioner, these works had been written in 1926 and 1924, respectively (1955 Br. 198, fn. 116).

Moreover, even on the basis of the literature which this Court considered in *Schneiderman*, the Court did not question that it could reasonably have been found that "the Communist Party in 1927 actively urged the overthrow of the Government by force and violence" (320 U.S. at 153). As the Court observed in *Schneiderman*, the issue there was not whether the Communist Party in 1927 had urged the overthrow of the government by force and violence, but rather whether the government had sustained its burden of proving, by "clear, unequivocal, and convincing" evidence, that Schneiderman himself was lacking in attachment to the Constitution at the time of his naturalization (*id.*, pp. 153-154).

The Board, in concluding that petitioner considered its allegiance to the United States subordinate to its loyalty to the Soviet Union, also relied on petitioner's complete adherence to the Marxist-Leninist theory of imperialism. According to this theory, Communist Parties throughout the world are duty-bound to support and defend their leader, the Soviet Union against the imperialist camp and particularly the United States (R. 2551-2558, 2638-2641). This means that in case of war between the Soviet Union and the United States, petitioner's members must do all in their power to support the Soviet Union (R. 2554-2556).⁹⁶ As just a few recent examples of such indoctrination of petitioner's members, witness Lautner, a high Party official, testified that the Party's position when he left it in 1950 was that Party members should do all they could to aid the Soviet Union and defeat the United States (R. 2551-2552, 2555); seven other former members of petitioner testified that they were taught between 1943 and 1952 that, in a war between the Soviet Union and the United States, they must aid the Soviet Union even if it meant hindering American military operations (R. 2551, 2555-2556);

⁹⁶ The theory of imperialism is closely related to the Marxist-Leninist theory of "just" and "unjust" wars (R. 2554-2555), which petitioner taught its members at least as late as between 1945 and 1950 (R. 2555, 2641). Any war engaged in by imperialist countries and especially against the Soviet Union is an unjust war. Inherent in this doctrine is the requirement that Communists support the Soviet Union and overthrow imperialism even if it means defeating one's own government. Petitioner took the position that the Korean War was such an "unjust war" (R. 2641).

in 1950 one of petitioner's leaders denounced the United States for inciting war against the Soviet Union and urged petitioner's members to wage a "ideological and political offensive in the defense of the Soviet Union" (R. 2640).

2. *The Board and the court below correctly construed and applied the statutory criteria for a Communist-action organization in Section 3(3) of the Act*

Section 3(3), as we have shown (*supra*, pp. 139-140), provides the sole criterion for determining whether an action is a "Communist-action organization." It defines "Communist-action organization" as "any organization in the United States * * * which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement [described at length in Section 2] and (ii) operates primarily to advance the objectives of such world Communist movement * * *." As to the first requirement, the Board found that petitioner "is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement referred to in section 2 of the Act," and, as to the second, that petitioner "operates primarily to advance the objectives of such world movement" (R. 2644, 2402). In arriving at these conclusions the Board considered, as required by the Act, the evidentiary considerations set forth in Section 13(e) (see *supra*, pp. 233-253):

(a) *The foreign control requirement of Section 3(3)*

Petitioner attacks the Board's finding that petitioner is substantially directed, dominated, or con-

trolled by the Soviet Union in two respects; first, it claims (Br. 96-98) that Section 3(3) requires proof of control, not merely voluntary adherence, and that control "presupposes the existence of some significant means whereby the superior can compel compliance with its requirements or at least impose sanctions for non-compliance" (Br. 96); second, petitioner contends that there is no evidence that petitioner receives orders from the Soviet Union nor any evidence of any means by which the Soviet Union could exact compliance with such orders were any given (Br. 98-102).

(i) Petitioner asserts that Section 3(3) requires proof of power in the principal "to insure satisfactory compliance with its orders, such as the supervision of an employee by an employer or the reporting by a soldier to his commander" (Br. 97). Thus, it implies that the Act requires proof that the Soviet Union can imprison or remove petitioner's officers who refuse to follow the orders of the world Communist movement. But Congress could not have intended to include within the definition of Communist-action organization only those organizations which are subject to such direct compulsion or sanctions by the Soviet Union. If this were the meaning of Section 3(3), it would be almost impossible for any organization to be a Communist-action organization as long as the United States is a sovereign nation. Congress of course knew that the world Communist movement could not imprison officials of American Communist-action organizations who disobeyed its orders; similarly, Congress knew that the Soviet Union could directly remove only its own employees, *i.e.*, persons

already required to register under the Foreign Agents Registration Act (see *supra*, pp. 50-53). Since Congress clearly intended the provisions of the Act relating to "Communist-action organizations" to have at least some possible application, the phrase "substantially directed, dominated, or controlled" must be construed in a more realistic and reasonable fashion.

Such a construction, moreover, is the only one fully consistent with the language of the Act. First, it is necessary to examine the language of Section 3(3) itself. While petitioner emphasizes that Section 3(3) includes a "control component," in fact proof of direction, domination, *or* control is sufficient. Indeed, Section 3(3) requires only that the organization be "*substantially* directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement * * *" (emphasis added). This phraseology strongly implies that proof of direct, coercive power is not required.

Second, Section 13(e) provides that "[i]n determining whether any organization is a 'Communist-action organization,' the Board shall take into consideration" eight particular factors. Among them is the direction that the Board shall consider "the extent to which [the organization's] principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives" which control the world Communist movement. If petitioner's view were correct, the Board would be required to consider only whether the organization's

leaders and members "are subject to" the disciplinary power, not alternatively whether they "recognize" it. This phraseology strongly supports the view of the court of appeals that voluntary compliance, *i.e.*, recognition as well as compulsion, may be sufficient.

As the court of appeals held (R. 2654): "An organization or a person may be substantially under the direction or domination of another person or organization by voluntary compliance as well as through compulsion. This is especially true if voluntary compliance is simultaneous in time with the direction and is undeviating over a period of time and under variations of direction. If the Soviet Union directs a line of policy and an organization voluntarily follows the direction, the terms of this statutory definition would be met."

(ii) Petitioner's claim as to the lack of evidence showing substantial direction, domination, or control is dependent on its argument concerning the proper construction of the Act. For the Board's findings as to the evidentiary considerations in Section 13(e), which we have discussed above (pp. 232-253), clearly show continued and complete voluntary compliance having the same effect as total control enforced by direct sanctions. As the Board found, this evidence demonstrates that "[a]t the outset of its existence [petitioner] joined the Communist International * * * [and] agreed to accept its directions and to adopt the policies enunciated by it" and that, despite petitioner's formal disaffiliation from the Communist International, its adherence to the world Communist movement remains intact (R. 2642-2643).

"Leaving aside the denials of its witnesses that the alleged relationship with the Soviet Union and the world Communist movement exists, it is striking that [petitioner] is unable to point to events in the various periods of its history demonstrating its independence and bona fide domestic character. Having continually fought the charge at least for two-decades, if not before, that it is foreign controlled the lack of affirmative, substantial evidence of independence is all the more significant" (R. 2643-2644).

Moreover, even if the Government was required to show more than "voluntary compliance," the evidence described above is still sufficient. While the Soviet Union may not be able to imprison or remove disobedient leaders of petitioner directly, it has decisive coercive power through its power to criticize petitioner and, if need be, expel it from the world Communist movement. While to a non-Communist this may not have coercive effect, to believers in Marxism-Leninism and its doctrine of "democratic centralism" this is a very serious punishment indeed.

Obviously, whether the possibility of a particular action has a significant coercive effect depends on the mental attitudes and views of the person affected. If an employee does not care whether he loses his job, the employer's power to discharge him has no coercive effect. Similarly, a non-Communist can hardly be coerced by the threat of being labeled a "revisionist" or "left-wing sectarian" by the Soviet Union. But to a Communist the mere threat of such labels is likely to be frightening. *A fortiori*, for petitioner, the loss of its connection with the world Communist movement—

the fate of the Tito government⁹⁷—constitutes a threat to the very existence of petitioner as it is now constituted. Thus, while petitioner's attempts to avoid such a serious result—coupled with its total allegiance to the Soviet Union—may have the appearance of “voluntary compliance,” nevertheless, the Soviet Union possesses substantial coercive power to prevent any important deviation.⁹⁸

(b) The objectives requirement of Section 3(3)

In order for an organization to be a Communist-action organization, Section 3(3) also requires that a finding that the organization “operate[s] primarily to advance the objectives of [the] world Communist movement.” Section 2(1) defines the “purpose” of this movement as “by treachery, deceit, infiltration * * *, espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship * * * throughout the world.” And Section 2(2) and (3) describes a “totalitarian dictatorship” as a system of government characterized by the existence of a single political party, organized on a dictatorial basis, * * * by substantial identity between such party and its policies and the government and governmental policies,” and by “the suppression

⁹⁷ It is significant that petitioner immediately complied with the Soviet Union's bitter attack on the Tito government in 1948 and with Jacques Duclos' criticism of petitioner's leadership and policies in 1945 (see *supra*, pp. 235, 243).

⁹⁸ Petitioner itself suggests that the power of the Communist International to expel members “might supply a means of control” (Br. 109). The same is true as to the power of the world Communist movement—whether formally organized or not—to expel disobedient national Communist Parties.

of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties * * *, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism and brutality."⁹⁰ The Board concluded, in substantially the same terms as Section 3(3), that petitioner "operates primarily to advance the objectives of [the] world [Communist] movement" (R. 2644). We submit that this finding is fully supported by the evidence.

(i) As we have seen (pp. 238-239), petitioner throughout its history has adhered to, taught, and practiced the doctrines of Marxism-Leninism. Lenin defines the dictatorship of the proletariat as a state in which all important decisions are made at the direction of the Party: "[I]t could be said that the dictatorship of the proletariat is in essence the 'dictatorship' of its * * * Party * * * " (R. 2429). Stalin stated that all opposition of landlords and capitalists must be liquidated, that "the dictatorship of the proletariat is the rule—unrestricted by law and based on force—of the proletariat over the bourgeoisie * * *," and that the dictatorship of the proletariat will abolish "democracy for all" (R. 2430, 2431). The record includes overwhelming evidence that, according to Marxism-Leninism, the Communist Party is to be the only party in the dictatorship of the proletariat, its policies will be those of the state, and the Party will be organized on a dic-

⁹⁰ See *supra*, pp. 125-139, for our discussion concerning the constitutionality of this standard.

tatorial basis according to democratic centralism (R. 2431-2434). Thus, it is clear that one of petitioner's objectives is a system of government "characterized by the existence of a single political party, organized on a dictatorial basis, * * * by substantial identity between such party and its policies and the government and governmental policies," and "by the suppression of all opposition to the party in power * * *."

While of course neither Marxism-Leninism nor petitioner's own publications specifically praise "the denial of fundamental liberties" * * * and * * * the maintenance of control over the people through fear, terrorism and brutality," this is clearly the meaning of the dictatorship as it has been practiced in all Communist countries. And indeed, in an official party publication in 1950, William Z. Foster, petitioner's leader at the time of the Board hearing, endorsed the methods of proletarian dictatorship followed in the People's Democracies (R. 2507), i.e., the Communist governments of Eastern Europe, which, of course, have suppressed liberty and used brutality and terrorism.

Petitioner contends (Br. 103-104), again, that *Schneiderman v. United States*, 320 U.S. 118, establishes that the "dictatorship of the proletariat" is not the equivalent of a "totalitarian dictatorship." But this Court's finding in *Schneiderman* was of course based on the evidence before it. The Court did not consider the texts of Stalin, as well as other subsequent Marxist-Leninist "Classics," relied on by the Board here (see R. 2428-2434; see *infra*, pp. 249-

251). Nor, of course, did the Court have before it the content poured into the term "dictatorship of the proletariat" by over thirty years of history in the Soviet Union as well as shorter periods in eastern Europe and China—history which petitioner has specifically endorsed (R. 2507-2509).

(ii) Petitioner also argues (Br. 102-103) that the objectives requirement of Section 3(3) requires proof that the organization seeks as an objective "the overthrow of all existing capitalist governments by espionage, sabotage, terrorism, or force and violence" (Br. 102). Section 3(3) requires proof, however, only of the organization's objectives not as to its particular methods. And Section 2(1) states as a legislative fact, not as an element to be proved, that the world Communist movement used "treachery, deceit, [etc.] and *any other means deemed necessary*" to achieve its objectives (emphasis added). Thus, when Sections 3(3) and 2(1) are read together, it is clear that the objectives requirement is satisfied by proof that an organization operates in order to establish a Communist totalitarian dictatorship as defined in Section 2(2) and (3).

Petitioner's argument rests on Section 2(6) which states that "Communist action organizations * * * endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship." But this provision as to the means used by Communist-action organizations merely as-

serts legislative facts; it adds nothing to the requirements of Section 3(3) that the Board need find only that the organization operates primarily to advance the objectives of the world Communist movement. And Section 2(6) itself indicates that these are means to attain the "objectives of the world Communist movement," which is virtually the same phrase used in Section 3(3), and which therefore refers to the only definition of these objectives in the Act, i.e., the "purpose" stated in Section 2(1).

In any event, even if proof of advocacy of force and violence is necessary, it is amply shown in the record before the Board. See our discussion of the "allegiance" consideration in Section-13(e) (8), *supra*, pp. 248-253. In short, the Board had substantial evidence on which to base its finding that petitioner "has as a fundamental purpose, which it constantly seeks to further, the overthrow of the government of the United States by any means, including force and violence if necessary * * *" (R. 2641-2642).¹

(iii) Petitioner further claims (Br. 102, 104) that the government must also prove that the totalitarian dictatorship established "will be subservient to the most powerful existing Communist totalitarian dictatorship." This contention also rests on Section 2(6) which, as we have shown, states legislative facts concerning Communist-action organizations but does not add to the objectives ("purpose") of the world Communist movement specified in Section 2(1).

¹ As we have shown (pp. 104-106), the First Amendment does not require proof of incitement to illegal action before a registration provision can be enforced. And nowhere is there any indication in the Act of such a requirement.

But even if Section 2(6) is construed as requiring proof of this additional objective, the evidence provides such proof. The evidence which we have summarized above as to the foreign control requirement of Section 3(3) (*supra*, pp. 253-258) shows that in the Marxist-Leninist system, which is taught and practiced by petitioner, the Soviet Union is the dominant leader of the world Communist movement whether the particular national Communist Party has achieved power (the totalitarian dictatorship) or not. Therefore, after the attainment of the dictatorship of the proletariat in the United States, petitioner would continue to be controlled by, and *a fortiori* subservient to, the Soviet Union.²

The Board's finding that petitioner is a Communist-action organization is based upon proof as to its current practices and activities as illuminated by its past history

Petitioner's contention (Br. 105-111) that "[t]he Board and the court below erroneously relied on evidence of conduct discontinued before enactment of the Act" (Br. 105) is without merit. The finding that petitioner is a Communist-action organization is based on petitioner's current practices and activities as illuminated by its entire past history.

That an organization's past history is a relevant and important consideration in determining its present character and status cannot be doubted. See *Federal Trade Commission v. Cement Institute*; 333

² The court of appeals did not decide whether petitioner's construction of the "objectives component" was correct, since it found ample evidence to satisfy the objectives requirement even as construed by petitioner (R. 2655).

U.S. 683, 703-706; *United States v. Oregon Medical Society*, 343 U.S. 326, 333; *United States v. Reading Co.*, 253 U.S. 26, 43-44; *Standard Oil Co. v. United States*, 221 U.S. 1, 74-76; *United States v. Dennis*, 183 F. 2d 201, 231 (C.A. 2), affirmed, 341 U.S. 494.

It is both good sense and good law to use the past to illuminate the present. As the court below said (R. 2140-2141):

The past is clearly pertinent to the present nature of a person or an organization. Surely a person's education and experience are pertinent to his present nature. The same is true of an organization. As a matter of fact it is rarely, if ever, possible to prove present nature by some instantaneous, contemporaneous fact, totally ignoring the whole of the past. Not only is the past clearly pertinent, it may be quite material to a determination of present nature. Whether it is material depends upon whether there is affirmative evidence of departure from the established past. In the ordinary affairs of life and in ordinary litigation, if a person or an organization is shown to have had over many years a certain policy and program, and no more is shown, the conclusion is clearly indicated that he or it has the same policy and program in the present.

Petitioner, however, attacks the Board's use of pre-Act evidence in two respects. It claims: (Br. 108-111) that the Government failed to prove that petitioner continued to be controlled by the Soviet Union after petitioner's disaffiliation from the Communist International in 1940. Ample evidence, however, was before the Board—including a resolution of petitioner's

1940 convention (*supra*, p. 55)—to show that the reason for the disaffiliation was to avoid a federal statute, not because of any meaningful change in petitioner's views or role in the world Communist movement (R. 2512-2515); that petitioner's reorganization in 1945, including the expulsion of its top officer and his supporters and the marked change in several of its policies, was a result of criticism from important international Communist leaders (*supra*, p. 235); that the identity of position between petitioner and the Soviet Union has continued since 1940 and has included the reversal of petitioner's position with regard to the Tito government in 1948, one day after the Soviet Union's bitter attack on that government (*supra*, 242-245); that petitioner has retained its complete adherence to the doctrines of Marxism-Leninism, including that which makes the Soviet Union the unquestioned leader of the world Communist movement, entitled, according to the doctrine of democratic centralism, to full obedience from all lesser groups within the movement (*supra*, p. 236-240); and that petitioner has indoctrinated its members since World War II with the doctrine that complete loyalty must be given to the Soviet Union, superseding any allegiance to the United States even to the extent of fighting against the United States in case of war (*supra*, pp. 248-253). All this evidence relates to petitioner's activities beginning with its formal disaffiliation from the world Communist movement in 1940 and demonstrates that petitioner's character has remained substantially unchanged.

Petitioner further contends (Br. 105-108) that the evidence relating to events after 1950 is insufficient to show "the current character of petitioner, i.e., whether or not it was a Communist-action organization at the time of the administrative proceeding, or, in any event, after September 23, 1950, the date of enactment of the Act" (Br. 105). The post-Act evidence is, however, far from being as negligible as petitioner would have it. The fact that it requires two pages of petitioner's brief (Br. 106-108) merely to itemize the post-Act evidence, whose insufficiency it insists upon, is significant.

Nor is this evidence "absurdly irrelevant" (Br. 108), as petitioner suggests. Petitioner recognizes, for example, that the "non-deviation" evidence relates to the post-Act period quite as much as to the preceding thirty years of its history (Br. 107; see also the testimony of Gates, the editor of the *Daily Worker* at the time of the hearing (*supra*, p. 244, fn. 90)). We have already shown that such evidence is of substantial importance (*supra*, pp. 143-144, 241-245). Moreover, petitioner admits that there is post-1950 evidence that petitioner continues to adhere to Marxism-Leninism, including the specific tenet that capitalistic governments must be overthrown by force and violence, if necessary, and that the Soviet Union is the dominating leader of the movement (Br. 107). As we have shown (pp. 236-240, 259-261), petitioner's complete allegiance to Marxism-Leninism goes far in establishing both the control and objectives requirements of the Section 3(3) definition of Communist-action organization. Neither is petitioner's argument aided, to cite but one more example,

by its including among the "irrelevant" items of post-Act evidence the fact that some of its present officials "held positions in the Communist International prior to 1940 and had visited, and in some cases studied, in the Soviet Union prior to 1940" (Br. 106).

Petitioner's argument that the post-Act evidence is of but trifling significance is further refuted by the fact that, of the 493 government exhibits in evidence, 57 post-dated the Act and were extensively used as the evidential bases of many particular findings in the Board's Modified Report. Four of the sixteen^{*} former members of petitioner who testified for the Government were members during the post-Act period, as late as 1952 (see R. 2646-2649), and all of these testified extensively concerning the post-Act period. Not one of these witnesses indicated that petitioner's character and nature had undergone any change in the post-Act period. Their testimony was, rather, entirely to the contrary. Petitioner's own witnesses similarly insisted that, at least since the time that they had become members of petitioner's National Committee, which was in 1938 in the case of Miss Flynn and 1945 in the case of Gates (R. 1275, 1199-1200), the Party was the same sort of organization at the time of their testifying as it had previously been (R. 1211-1227, 1235-1241, 1282-1291; Tr. 15031-15032, 15795-15796). Petitioner does not even now claim to have changed its essential character and nature since the Act became law. Its whole position

^{*}This figure does not include the three witnesses whose testimony was stricken, since their evidence was not considered in the Modified Report.

in this case has been that it has not been, at least since 1940, an organization of the type this Act defines. The Government's evidence established the contrary—that the petitioner was and is such an organization.

Indeed, even if the record showed sudden protestations of reform upon the passage of the Act, *United States v. Oregon Medical Society*, 343 U.S. 326, teaches that such protestations should be scrutinized with care before being accepted at face value. "When defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of antitrust laws," the Court said, "courts will not assume that it has been abandoned without clear proof. * * * It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption" (*id.*, p. 333). See also *United States v. Parke, Davis & Co.*, 362 U.S. 29, 48; *Independent Employees Assn. v. National Labor Relations Board*, 158 F. 2d 448, 455 (C.A. 2), certiorari denied, 333 U.S. 826. The same considerations apply in considering petitioner's efforts to defeat various forms of federal regulation since 1940 "by protestations of repentance and reform."

.. In sum, the evidence establishes the character of petitioner as a Communist-action organization from 1919, when it was founded, through the 1940's. While the Government's evidence as to petitioner's post-1950 activities might, perhaps, not independently prove it to be a Communist-action

organization, this evidence is at least sufficient to show that petitioner's character has not substantially changed, at least as to matters relevant under the Act. And petitioner, which is obviously in a position to prove any such change, has completely failed to do so.

4. *The Board's conclusion that there exists a world Communist movement, having the characteristics described in Section 2 of the Act, while not essential to the validity of its order, was in any event supported by the preponderance of the evidence*

Petitioner contends (Br. 124-126) that the Board erred in finding from the evidence before it that "there exists a world Communist movement, substantially as described in Section 2 of the Act" (Petitioner's 1955 Br. 193; R. 2509). This contention is based, however, on the assumption that the existence of a world Communist movement as found by Congress in Section 2 of the Act, and having the characteristics described in that section, was subject to redetermination in the administrative proceeding before the Board. As petitioner admits in a different portion of his brief (Br. 57), this assumption is untenable—the existence of this world movement is one of the legislative facts found by Congress in the Act itself.⁴ Section 3(3) defines "Communist-action organization" and it requires no findings in this regard. The court below was correct, therefore, in stating that it was unnecessary to redetermine the existence of what Congress had found in

⁴ See *supra*, pp. 127-133, for our answer to petitioner's contention that this finding by Congress renders the Act unconstitutional.

the Act to exist (R. 2133). *Galvan v. Press*, 347 U.S. 522, 529; *Carlson v. Landon*, 342 U.S. 524, 535-536.

The Board, however, reviewed the evidence before it (R. 2453-2510) and made an independent finding that there exists such a world Communist movement, substantially as described in Section 2 (R. 2509). Similarly, in the original opinion, the court below, notwithstanding its holding that it was unnecessary to redetermine the existence of this movement, undertook, because the Board had made such an independent finding, to review the evidence (R. 2133-2138), and concluded that the finding was "supported by a clear preponderance of the evidence" (R. 2138). Subsequently, the court reaffirmed the Board's finding (R. 2656): "[W]hether that finding is superfluous or not the fact is established, either by the congressional finding or by the Board finding, or by both."⁵ We submit that this conclusion is correct.

The evidence established far more than the presence of what petitioner describes as "a world Communist movement in the sense that the various Communist parties throughout the world have a common outlook and work in their respective countries for the revolutionary attainment of a 'classless, stateless society ruled by the proletariat of the world'" (Br. 124-125). This assertion as to the finding of the court below is a serious distortion. The court, while observing that the professed "ultimate objective" of the world Communist movement is a world-wide "classless, stateless society" (R. 2137), observed also that "[i]n the in-

⁵ See also the most recent opinion of the court below (R. 2761).

term the program calls for a small, hard core of revolutionaries, formed into a disciplined Party in every country"; that "[t]his Party is to attain control of the government of its country for the purpose of destroying its present form"; and that "[i]n this interim operation the Party must be ruthless" (*ibid.*).

What this "ruthlessness" is to consist of is also described by the court. In the achievement of the "dictatorship of the proletariat," the court stated, Stalin, the heir of Lenin and the recognized leader of the world movement until his death, "stressed the necessity for violence" (R. 2134). The court quoted Stalin's statement in his *Foundations of Leninism* (A.G. Ex. 121, R. 1427, at 1434) to the effect that Lenin was "right in saying" that the "proletarian revolution" would be "impossible without the forcible destruction of the bourgeois state machine and the substitution for it of a new one * * *" (R. 2135). The court then quoted passages from other authoritative works among the classics of world Communism (R. 2135-2137), all in evidence in this case, and all tending to prove beyond a doubt that the world Communist movement is indeed, substantially, as Section 2(1) of the Act describes it, "a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

Petitioner assumes that, because its witness Aptheker testified that a "dictatorship of the proletariat" would be, and as practiced in the Soviet Union is, democratic government in its purest form (see R. 1266-1267, 1306-1309, 1310),⁶ the Board was bound to accept his testimony and to make findings with respect to the objective of the world Communist movement which would in effect adopt his views (Petitioner's 1955 Br. 196-198). The Board, however, was under no such compulsion, particularly when it had before it the following more authoritative views as to what the dictatorship of the proletariat is, how it should arise, and how it should operate in practice (Stalin, *Problems of Leninism*, A.G. Ex. 138, R. 1500, at 1505-1507):

"In order to win the majority of the population to its side," Lenin continues, "the proletariat must first of all overthrow the bourgeoisie

⁶ Among other things Aptheker testified that freedom of religion and of the press is enjoyed in the Soviet Union (R. 1308). He stated that when Communists succeed in getting control of a country opposing political parties are allowed to continue to exist and publicize their views as long as "different classes" continue to exist (R. 1306); that, indeed, when the Communist Party gets into a position of leadership in a country it willingly shares its leadership with other parties (*ibid.*)

⁷ This work was described by witness Meyer as "one of the 'central' textbooks used in Communist Party schools in the United States (R. 689). Though written in 1926 (Petitioner's 1955 Br. 198, fn. 116), the English translation was first pub-

and seize state power and, secondly, it must introduce Soviet rule, smash to pieces the old state apparatus, and thus at one blow undermine the rule, authority and influence of the bourgeoisie and of the petty-bourgeoisie compromisers in the ranks of the non-proletarian toiling masses. * * *

Such are the characteristic symptoms of the proletarian revolution.

Replying to those who confuse the dictatorship of the proletariat with "popular," "elected" and "non-class" government, Lenin states:

"The class which has seized political power has done so conscious of the fact that it has seized power alone. This is implicit in the concept of the dictatorship of the proletariat. This concept has meaning only when one class knows that it alone takes political power into its own hands, and does not deceive itself or others by talk about popular, elected government, sanctified by the whole people." * * *

lished in the United States in 1934 (R. 1500). It was one of the "classics" studied by witness Lautner at the Party's National Training School in 1941 (R. 943-944, 946, 949) and used by him as a textbook and sourcebook when he himself became a teacher in the Party's schools from 1947 till his expulsion in 1950 (R. 950-952).

Pointing to one of the most important aims of the dictatorship, namely the suppression of the exploiters, Lenin states:

"The scientific concept, dictatorship, means nothing more nor less than power which directly rests on violence, which is not limited by any laws or restricted by any absolute rules * * *. Dictatorship means—note this once and for all, Messrs. Cadets [ed. note: "The Constitutional Democrats"]—unlimited power, resting on violence and not on law. * * *"

Petitioner also argues (Br. 125–126) that Section 2 describes the world Communist movement as having "a highly centralized world-wide organization, rigid Soviet control, and use of violent and criminal means, if necessary" and that the evidence does not show such a movement (Br. 125). As to petitioner's first contention, it is clear that Congress in finding that the world Communist movement operated through a world-wide Communist organization (Section 2(1), (5), (8)) did not use "organization" in any narrow sense. Thus, Section 2(8) describes the world Communist movement as "affiliated constituent elements working toward common objectives in various countries of the world", and Section 3(2) defines an organization as "an organization, corporation, * * * and includes a group of persons [which is defined in Section 3(1) as an individual or organization], whether or not incorporated, permanently or temporarily associated together for joint action on any subject or subjects." The record overwhelmingly establishes a world Communist movement in this

sense not only when the Communist International was in existence before 1943 (R. 2456-2487), but since that time (R. 2487-2499). Thus, the Board notes numerous statements by high Soviet officials, the origin of the Cominform, and resolutions of national Communist Parties showing, at the least, the close affiliation and association of Communist Parties throughout the world.

Second, the evidence is equally clear that the world Communist movement is directed and controlled by the Soviet Union (Section 2(4), (5)). As we have seen (*supra*, pp. 236-240), Marxism-Leninism, which is the basic doctrine of the national Communist Parties, makes the Soviet Union the dominating leader of the movement. This is reflected in repeated statements by Communist leaders throughout the world of the leadership position of the Soviet Union (R. 2488-2499). Just as petitioner gives its complete allegiance to the Soviet Union (*supra*, pp. 243-253), so do other national Communist Parties (R. 2497-2499).

Third, there is also no doubt that the world Communist movement advocates the use of violent and criminal means, if necessary. Not only is force and violence an accepted part of the Marxist-Leninist doctrine (see *supra*, pp. 248-251, 271-274), but these means have actually been used since World War II in Czechoslovakia and China, among other places (see R. 2501-2504).

In short, the record amply supports the Board's conclusion that there exists a world Communist movement substantially as described in Section 2 of the Act.

C. THE COURT BELOW CORRECTLY AFFIRMED THE BOARD'S ORDER, NOTWITHSTANDING THE FACT THAT IT MODIFIED ONE OF THE SUBSIDIARY FINDINGS OF THE BOARD

Petitioner contends (Br. 144-146) that "the court below, having stricken a key finding of the Board, erred in not remanding the case for administrative redetermination" (Br. 144).

In its original Report, the Board made a subsidiary finding under Section 13(e)(7) that petitioner engages in secret practices both to "promot[e] its objectives and thereby to advance those of the world Communist movement" and for concealing * * * its direction, domination and control by the Soviet Union" (R. 117 [2016]). On appeal, the court below stated that "[t]here is no serious dispute as to the facts in respect to [petitioner's secret] operations," but struck the Board's finding as to the purpose of these operations: "[w]hether the secret practices of the Party are for the purpose of protecting the liberties of the members or are for the purpose of promoting the objectives of the Party is a nebulous one. The two purposes may well overlap" (R. 2150-2151). But the court also stated that petitioner's claim as to the purpose of secrecy was also "not shown by a preponderance of the evidence" (R. 2151).

After the remand by this Court, the Board re-evaluated the entire record and found that petitioner engaged in secret practices "for the primary purpose of promoting its objectives and thereby to advance those of the world Communist movement" (R. 2615, 2631), but made no finding that these practices were "undertaken to conceal foreign domina-

tion" (R. 2615, fn. 116). On appeal, petitioner moved in the court below for a remand to require the Board to conform its findings on secret practices to the earlier decision of the court of appeals and to reconsider its conclusions in the light of the conformed finding (R. 2717). The court of appeals denied this motion. After argument, the court below, in its latest opinion, again indicated that the Board's "purpose" finding was not supported by a preponderance of the evidence but refused to order the Board to reconsider its ultimate determination that petitioner is a Communist-action organization (R. 2701). Despite the striking of this subsidiary finding, the court found that "[t]he preponderance of all the evidence supports the conclusion of the Board" (R. 2706).

1. We submit that, contrary to the decision below, the Board's secrecy finding is supported by a preponderance of the evidence. First, as the court below held in its original opinion, there can be no doubt that the record (see R. 2613-2631) shows the use of "concealed membership, refusal to reveal information, secretion of records, deceptive language, the use of aliases, the use of codes, false swearing, secret meetings, reduction of committee memberships, assignment of members to small groups, underground plans and operations, and the infiltration of other organizations" (R. 2150). The only real issue is the purpose of these practices.

The record shows that the Marxist-Leninist "Classes" to which petitioner fully adheres, and the official publications of the Comintern, provide that secret

practices must be employed by Communist Parties to achieve their objectives. Lenin emphasizes that some secrecy is always necessary, although the amount depends on whether the Party is allowed to operate legally in a particular country (R. 2615-2616). The Marxist-Leninist "Classics" also state that secrecy was one of the vital elements of the Russian Revolution (R. 2615, 2617). And it is clear that the secrecy prescribed by Marxism-Leninism is not to protect the Party's members—rather, at the "decisive moment," there will be a secret apparatus which will "in every way possible assist the revolution" (R. 2616).

Petitioner operated entirely underground in the early 1920's (R. 2619). While the Party subsequently started to operate openly, the underground apparatus remained. This apparatus was strengthened between the signing of the Hitler-Stalin Pact in 1939 and the German invasion of the Soviet Union in June 1941 so that—as Eugene Dennis stated—if the United States joined Great Britain against Hitler, petitioner would be prepared to turn an imperialist war into a civil war, as Lenin had advocated (R. 2619-2620). For this reason, a complete underground system was established (R. 2620).

While this system was relaxed after 1941, extensive secret practices were renewed in 1948 (R. 2620-2623). In *Political Affairs*, an official Party organ, Gilbert Green stated that the purpose of secrecy was to prevent the disruption of the world Communist movement (R. 2623). Witness Meyer, a long time Party member, testified that the reason petitioner stopped issuing membership books was "to protect [its] mem-

bers * * * from an attack on the Party" and, in addition, "[t]o keep the apparatus of the Party in such shape that it could function even if the Party were [declared] illegal" (R. 698). Witness Lautner, who was a member of the Party's National Review Commission and in charge of security for the Party in New York State in 1948-1950 (R. 2648), testified that, by January 1950, petitioner had put into effect "a system of threes" patterned after the European Communist Parties in order "to safeguard the continuity of the Party" (R. 913; see R. 2621). Petitioner's members were taught and have used various code systems for transmitting Party information (R. 2627-2628). Reserve sums of money were set aside and mimeograph and printing equipment assembled in secret hiding places (R. 2618). That the purpose of these methods was to protect the Party and its objectives appears not only from the direct testimony of the Attorney General's witnesses, but from the very nature of the methods. Ordinary secrecy could conceivably be intended to protect petitioner's members; secret codes and mimeographing equipment are intended to further Party purposes.

Through the post-war period, petitioner continued its program of infiltrating other organizations and forming secret factions within them for the ultimate purpose of attaining control (R. 2624). Petitioner's activity through secret Party members has been particularly great in trade unions (R. 2624-2625). This is consistent with Lenin's statement that trade unions are "a very useful auxiliary to the political, agitational and revolutionary organisations" and that they

can be controlled by a "small, compact core" of agents "connected by all the rules of strict secrecy within the organisations of revolutionists" (R. 2624). In the late 1940's, petitioner instructed its members holding positions in labor unions to "resign" formally, to avoid the non-Communist affidavit provisions of the Labor Management Relations Act, but nevertheless continue functioning as Party members (R. 2625). As the Board found, "It is clear that these measures were undertaken by [petitioner] for the express purpose of effectuating its trade union policies and not to protect its members" (*ibid.*).

It is true that many of petitioner's secret practices also help in protecting its members from federal prosecution since the Party can advance its objectives only if its members are not in jail. The court below, however, in its original decision (to which it subsequently adhered) indicated that the evidence must show that the practices were *either* intended to further Party objectives *or* were intended to protect its members. But Section 13(e)(7) does not suggest that the Board can only consider evidence of petitioner's secret practices which have as their *sole* basis the advancing of petitioner's objectives. On the contrary, that section allows the Board to consider "*the extent to which, for the purpose of * * * expediting or promoting its objectives * * **" an organization uses secret practices. Therefore, the Board was justified in making a finding as to the primary aim of the secrecy even though the secret "practices doubtless have a dual effect" (R. 2631). We submit that the evidence

overwhelmingly supported the Board's finding that the primary purpose of the secret practices was to carry out petitioner's objectives.

And even if the finding were erroneous, it is surely only so in stating that carrying out petitioner's objectives is *the* primary purpose, rather than one of the primary purposes of the secret practices. Such an error would be completely insubstantial, since it could not affect the Board's ultimate determination that petitioner operates primarily to advance the objectives of the world Communist movement. For the other possible primary objective of the secret practices—the protection of petitioner's members—cannot be the primary objective of petitioner's operations as a whole. If it were, petitioner could best protect its members from prosecution simply by dissolving. In short, a finding that the secret practices have as one of their primary purposes the carrying out of Party objectives would be equally substantial in proving the objectives requirement of Section 3(3) as the finding that the Board actually made.

2. But even if the Board's finding as to the purpose of the secret practices should be stricken in entirety, the decision of the court below not to remand this litigation to the Board for a complete redetermination of its finding is clearly correct. As we have seen (*supra*, pp. 139–140), the statutory considerations of Section 13(e) are in no true sense tests or criteria, the fulfillment of any one of which would suffice to establish that an organization met the Act's definition of a Communist-action group. It would be equally erroneous,

however, to assume that the Act requires affirmative findings under each of the Section 13(e) categories before an organization can be held to fulfill the Section 3(3) definition of a Communist-action group. Section 13(e) simply establishes certain categories of proof which Congress identified as relevant to the decisive issue presented by the Section 3(3) definition. Here, the Board made a finding as to secret practices since Section 13(e) requires the Board "to consider" eight categories of evidence. But the Board did not rely on or even mention this finding in making its ultimate determination (see R. 2642-2644).

The subsidiary findings which the court below affirmed as established by a preponderance of evidence, together with the other findings as modified, abundantly supported the ultimate and controlling finding that petitioner is a Communist-action organization, pursuant to which the Board ordered it to register under the Act. Under these circumstances—where it is clear that the Board's order would have been the same if the "purpose" finding had been omitted—remand of the case to the Board for redetermination of that issue was not required and would have served no useful purpose. The court below correctly affirmed the Board's order. *National Labor Relations Board v. Newport News Co.*, 308 U.S. 241, 247; *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 305 F. 2d 131 (C.A. 1), certiorari denied, 346 U.S. 887; *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 169 F. 2d 881, 883 (C.A. D.C.), certiorari denied, 335 U.S. 854; cf. *Universal Camera*

Corp. v. National Labor Relations Board, 340 U.S. 474, 488.*

IV

THE BOARD'S DETERMINATIONS RELATING TO PETITIONER'S MOTIONS TO REQUIRE THE GOVERNMENT TO PRODUCE VARIOUS DOCUMENTS WERE CORRECT AND DO NOT REQUIRE REVERSAL

Before considering the merits of petitioner's contentions, we submit that these contentions are not properly before the Court. Petitioner, when this case was first before the court of appeals, included the issue as to production of F.B.I. reports among the questions presented. Thus, even though petitioner did not argue the issue in its brief, it was properly before the court below on its original review. See Rule 76, Fed. R. Civ. P. But in the questions presented in its original petition for certiorari (pp. 4-5)

*The cases relied on by petitioner (Br. 146) are distinguishable from the case at bar. This is not a case in which it is unclear from the record on just what evidence the administrative findings are based (*National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U.S. 469, 479); nor one in which the administrative order would be sustainable if based on grounds which the record shows were not the actual grounds on which it was based (*Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94-95); nor one in which the reviewing court modified an administrative order (*Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20-21); nor one in which the administrative findings are "so shrouded in doubt" that the basis of the agency's action is not determinable (*Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634-635); nor one where the agency has failed to find essential basic facts (*Atchison, Topeka & Santa Fe Ry. v. United States*, 295 U.S. 193, 202; *Interstate Commerce Commission v. Chicago, B. & Q. R.R.*, 186 U.S. 320, 340-342).

and brief on the merits (pp. 2-3), petitioner stated no question which even by implication suggested any issue as to the production of documents. The only mention of the issue is in two passing footnotes in which petitioner claimed that the Board had refused to order production of reports relating to two specific factual incidents (pp. 204-205, fn. 130, and p. 207, fn. 132). Petitioner contended, not that such refusals to order production constituted error warranting reversal, but that the Board erred in making findings on the basis of the two incidents.⁹ On remand, both findings were specifically struck by the Board (R. 2393 and 2549, fn. 84). Thus, neither of the issues petitioner alludes to in these footnotes are now of any relevance.

The Rules of the Supreme Court expressly state that this Court will consider only questions raised in the petition for certiorari and the brief of the petitioner, except for "plain error." Rule 23 reads:

1. The petition for writ of certiorari shall contain * * *

(c) The questions presented for review * * *
Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

Rule 40 reads:

1. Briefs of an appellant or petitioner on the merits * * * shall contain * * *

⁹ These footnotes were in the section of the brief (p. 199) entitled "The Findings of the Board are Based on Incompetent and Discredited Evidence and on Misrepresentation of the Evidence."

-(d)(1) The questions presented for review * * *

2. The phrasing of the questions need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. *Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.* [Emphasis added.]

Despite the power of the Court to notice "plain error," it has almost invariably refused to consider issues not properly presented. Thus, the Court stated in *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 177, that "[O]ur consideration of the case will be limited to the questions specifically brought forward by the petition." Accord, e.g., *Crown Cork & Seal Co. v. Ferdinand Gutmann Co.*, 304 U.S. 159; *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350; *Trailmobile Co. v. Whirls*, 331 U.S. 40. The only apparent exceptions are when the Court finds that the error is so plain that no difficult legal or factual issues are involved. See *Sibbach v. Wilson & Co.*, 312 U.S. 1. In any event, the rules make clear that the only issues which can be considered are those properly presented to the Court unless the Court itself chooses to notice other issues. In the instant case the Court found no such "plain error" involving the production of the F.B.I. reports. Moreover, in this case the failure of the petitioner to include the question in its petition for certiorari or in

its brief on the merits was not due to oversight since the issue had previously been raised in the court of appeals. See *Trailmobile v. Whirls*, *supra*. It is thus clear that petitioner, having deliberately decided not to raise the issue before this Court for its own reasons, waived any claim it had.

A court on remand can consider any question left open by the mandate which has not been decided by the appellate court. *In re Sanford Fork and Tool Co.*, 160 U.S. 247; *Christoffel v. United States*, 214 F. 2d 265 (C.A. D.C.); certiorari denied, 348 U.S. 850. But this authority does not justify consideration of issues which have not been properly retained in the case. In *Christoffel v. United States*, *supra*, the court stated (*id.*, p. 267):

The questions now pressed are untimely. The case has been submitted twice before to this court, on appeal and on petition for rehearing, and has been before the Supreme Court. In none of these proceedings was any one of the matters now presented asserted as error. Upon examining each of them we conclude that in these circumstances none constitutes the kind of error which we ought now to consider.

And see *Ballard v. United States*, 329 U.S. 187, 190, where this Court indicated that a party cannot raise a claim, after a remand by this Court when the same party, as petitioner, has failed to present the issue to the Court. Accord, *Raydure v. Lindley*, 268 Fed. 338, 341 (C.A. 6).

The alleged error in the instant case is similar to that in *Christoffel* in which the defendant also alleged that evidence had been wrongly excluded. Although here the issue had been raised (but not argued)

before the court of appeals, it was deliberately not raised before this Court. Petitioner, having failed to retain the issue in the case, cannot be allowed to save error and thereby prevent final decision on all the issues.¹⁰

A. THE BOARD ACTED WELL WITHIN THE SCOPE OF ITS PROPER DISCRETION IN REFUSING TO STRIKE ALL OF WITNESS BUDENZ' TESTIMONY ON THE BASIS OF RECORDINGS AND NOTES OF HIS INTERVIEWS WITH THE F.B.I.

Petitioner contends (Br. 128-139) that the Board and court below erred in refusing to strike all the testimony of the Attorney General's witness Budenz. Petitioner reasons as follows: it was the fault of the Government that recordings and notes of Budenz' interviews with the F.B.I. relating to the Starobin and Childs-Weiner matters were not produced by the Government, upon petitioner's motion, when Budenz was

¹⁰ The court of appeals rejected this contention as to the Gitlow memoranda (R. 2659; see *infra*, pp. 302-310) and presumably would have rejected it as to the other production issues as well. The court held that a remand "for further proceedings in accordance with this opinion," "or a general unqualified remand, means that the appellate court and trial court are to reconsider the case on all other points" (*ibid.*). We submit, however, that this view is inconsistent with *Christoffel* and *Ballard* and would encourage litigants to save error. Moreover, the court suggested that, if petitioner had failed to state these issues as a question presented in its petition for review and brief in the court of appeals on the original review, it would have been waived and therefore could not be raised again on remand (R. 2659-2660). While the court below said that the Government's position would burden the Supreme Court "with a plethora of 'questions presented'" (R. 2659), it can hardly be said that petitioner failed to raise all available contentions because of self-denial. Its original petition urged thirteen issues, most of which comprehended numerous lesser questions.

being cross-examined at the original Board hearing; these documents show that Budenz lied about these two important issues; since by the time these documents were produced Budenz was too sick to undergo cross-examination, petitioner was deprived by the Government of the opportunity of demonstrating that all of Budenz' testimony was equally perjurious; therefore, the Board should have struck all of Budenz' testimony, not just that relating to the two matters. In the circumstances of this case, this claim has no merit.

1. Louis Budenz, who held important positions in the Communist Party from 1935 to 1945, including the editorship of the *Daily Worker*, testified for the Attorney General at the original Board hearing. His direct examination lasted almost two days and he was exhaustively cross-examined for five days (R. 2298; see R. 1114-1199). His testimony included eight pages of direct examination and thirty pages of cross-examination relating to the Starobin letter, and two pages of direct examination and ten pages of cross-examination on the Childs-Weiner conversation. This testimony is set forth in full in the Appendix, *infra*, pp. 316-322, 327-347.

During cross-examination of Budenz at the original hearing, petitioner moved for the production of any F.B.I. reports of interviews with Budenz concerning the Starobin letter and the Childs-Weiner conversation, but the Board denied the motions (R. 1185, 2277). Following the first remand by this Court, the Board again denied similar motions (R. 2217-2218, 2225). Subsequently, the court of appeals affirmed

the denials of these motions on the ground that there did not appear to be any such "statements" as defined in 18 U.S.C. 3500 (R. 2664-2666), although it remanded the case to the Board on another issue (R. 2679).

In response to a petition for rehearing filed by petitioner, the Board filed with the court of appeals an affidavit of counsel for the Attorney General stating that, on January 28, 1958, "in the process of preparing replies to petitioner's petition for rehearing * * *," he requested the F.B.I. to furnish affidavits by the Bureau agents, who conducted the interviews at which Budenz discussed the Starobin letter and Childs-Weiner conversations, setting "forth the circumstances under which the * * * interviews referred to were conducted" (R. 2685-2686); that the purpose of the affidavits was to answer petitioner's motion since Budenz had testified "that he had orally reported to the FBI on the subject here in issue and that his report on the so-called Starobin letter was made in the absence of a stenographer, with the interviewing agent merely taking longhand notes" (R. 2686); that on January 29, 1959, he "was informed that from December 6 to 12, 1945, * * * Mr. Budenz was interviewed by two Bureau agents, who took notes during the interviews (the first which the Bureau had with Budenz); but that, in addition, the interviews had been, without Budenz' knowledge, mechanically recorded on discs, which were still in existence" (R. 2686-2687); that he "was further informed that no subsequent interviews with Budenz, of which there had been many, had been electrically or mechanically recorded" (R. 2687); that the Starobin letter and the

Childs-Weiner conversations were among the wide range of matters discussed at the recorded interviews; and that "[t]he affiant had no knowledge, and upon information and belief neither Mr. Budenz nor any attorney who has participated in the preparation or presentation of this case to the Subversive Activities Control Board or to the courts had any knowledge, prior to January 27, 1958, of the existence of the aforesaid mechanical recordings * * *" (*ibid.*). The court thereupon enlarged the order of remand to include "statements," as defined by 18 U.S.C. 3500,¹¹ made by Budenz to the F.B.I. in regard to the Starobin and Childs-Weiner matters (R. 2694-2695, modified, R. 2696).

A member of the Board, sitting as an examiner considered the recordings *in camera* and excerpts dealing with the two matters were furnished to petitioner (R. 2387-2394). The member-examiner indicated that petitioner's request for the recall of Budenz for further cross-examination would be granted (R. 2388-2389). When a letter from Budenz' personal physician stated that cross-examination would imperil Budenz' health due to a heart condition, the member-examiner had Budenz examined by an independent heart specialist. The specialist stated in an affidavit that, because of an "extremely serious cardiovascular disease," cross-examination of Budenz "might seriously affect his health or cause his death. * * *

¹¹ Both the Board and the court below have assumed that 18 U.S.C. 3500, which in terms applies "[i]n any criminal prosecution brought by the United States," applies by analogy to the Board's proceedings (see, *e.g.*, R. 2390, 2694).

[E]ven the slightest amount of emotion could very well precipitate a serious outcome in [his] life" (R. 2389). The parties therefore agreed that Budenz was not available for recall (*ibid.*).

Petitioner then moved to strike all of Budenz' testimony and, in the alternative, moved, *inter alia*, (1) to strike Budenz' testimony as to the Starobin and Childs-Weiner matters, and (2) for an order directing production of the agents who participated in the December 1945 interviews with Budenz and directing them to bring their complete notes of the interviews (R. 2389). The member-examiner denied the motions except for the request to strike Budenz' testimony on the two matters. The Board then ordered the Government to produce all documents purporting to reveal oral or written communications on these matters. The Government produced four documents, portions of which related to the two matters. While contending that these four documents were not "statements" under 18 U.S.C. 3500, the Government agreed to their production, after irrelevant portions were excised, to remove the necessity of a Board determination of the issue (R. 2390). The pertinent excerpts were given to petitioner and received in evidence without objection.

As to the issue whether to strike Budenz' testimony, the full Board stated the question as "what is the fair thing to do in relation to his testimony, all circumstances considered. On the one hand, * * * there is lack of opportunity for further cross-examination in the light of the documents and, on the other, there is on the witness' part a lack of opportunity to be con-

fronted with any alleged inconsistencies in the documents" (R. 2391). After so stating the issue, the Board rejected petitioner's "assertion that on their face the documents produced show that Budenz' testimony on the Starobin and the Weiner matters was deliberately false" (*ibid.*). The Board then found that the Government was not responsible for Budenz' unavailability for cross-examination, that petitioner "had adequate opportunity, which was utilized" to cross-examine Budenz at the original hearing on his testimony other than on the Starobin and Childs-Weiner matters, that "[n]one of his other testimony was dependent upon, or inseparable from, his testimony on the Starobin and the Weiner matters," that much of Budenz' testimony was corroborated by other credited evidence, and that, although he was specific as to name, date, and place, none of the persons named were called by petitioner to refute his testimony (R. 2392-2393). The Board, therefore, concluded that "the preclusion of further cross-examination on the produced documents due to unavailability was not sufficient to constitute a material deprivation of cross-examination on his testimony as a whole" and that Budenz' testimony "is credible on the record as a whole" (R. 2392, 2393). Nevertheless, the Board decided that, "where, resolving all doubts in favor of the cross-examiner, any room is seen for further cross-examination * * *, the fair thing is to strike the testimony on the Starobin letter and the Weiner conversation" (R. 2393). On appeal, the court upheld this determination (R. 2703-2704).

2. Even if we accept as petitioner does (Br. 130) the general summary of the law on this issue in 5 Wigmore, *Evidence* (3d ed., 1940), § 1390, petitioner's contention is without merit. Wigmore first states that "[w]here the witness' *death or lasting illness* would not have intervened to prevent cross-examination but for the *voluntary act* of the witness himself or the party offering him—as, by a postponement or other interruption brought about immediately after the direct examination, it seems clear that the direct testimony must be struck out." (Emphasis in original). In all other circumstances, he continues, "the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss." Such discretion in the trier of fact should apply *a fortiori* to administrative tribunals which are generally given far broader discretion in considering evidence before them than are the courts. Application of the standard suggested by Wigmore to the facts of this case shows clearly that the Board was acting well within the scope of its proper discretion.

a. As the Board found (R. 2391-2392), the Government was not responsible for any restriction of petitioner's opportunity to cross-examine Budenz. First, according to the affidavit submitted to the court of appeals on February 5, 1959—which petitioner has never challenged—neither Budenz nor government counsel knew that recordings had been made of Budenz' initial interviews with the F.B.I. The only records of any Budenz interviews known either to

Budenz or government counsel were notes taken by F.B.I. agents during the interviews. While these notes were ultimately produced voluntarily by the Government so that the Board would not be required to decide whether they came within the meaning of "statements" in the so-called Jencks statute, 18 U.S.C. 3500 (R. 2390), these notes were not "substantially verbatim recital[s] of an oral statement"—the notes being obviously far shorter than required for the length of their interview—and were not "signed or otherwise adopted or approved by" Budenz (18 U.S.C. 3500(e)). Second, even if the Government is deemed in some way responsible for not producing the recordings or the notes, this responsibility is only in the physical sense. The Government took a legal position which at the time, prior to the decision in *Jencks v. United States*, 353 U.S. 657, had respectable, and perhaps majority, support in the courts of appeals. See the Government's Brief in *Jencks v. United States*, No. 23, Oct. Term, 1956, pp. 26-32. And, third, even if the failure to produce at the time of Budenz' testimony could be said to be, in some sense, the fault of the Government, the direct interference with cross-examination was confined entirely to two factual issues—and Budenz' testimony as to these issues was subsequently struck.

It is possible, as petitioner contends, that petitioner could conceivably have shown by cross-examination on the basis of the recordings and notes serious inconsistencies which would affect the credibility of Budenz' other testimony. But we submit that the Board could properly determine the likelihood of this indirect loss to petitioner and was not com-

pelled to strike automatically all of Budenz' testimony. This is particularly true since, as we will show (*infra*, pp. 299-301), petitioner had the opportunity to test Budenz' credibility on the Starobin and Childs-Weiner issues far more fully than it did. Petitioner, either voluntarily or by its own fault, did not use the resources for impeachment which were available. In sum, the Board was free to decide the issue on the basis of "what is the fair thing to do * * *, all circumstances considered" (R. 2391).

b. The Board's determination that the unavailability of the documents to petitioner did not "constitute a material deprivation of cross-examination in his testimony as a whole" (R. 2392) is supported by the evidence. First, no showing or even substantial suggestion has been made that Budenz' testimony as to the Starobin and Childs-Weiner matters was perjured. Petitioner cross-examined Budenz intensively on these two issues using prior statements made by Budenz in a book which he had written and in testimony before congressional committees (~~the~~ see the Appendix, *infra*, pp. 319-322, 334-344), without showing any substantial discrepancies. Similarly, a comparison of the quotations from the recordings and notes¹² with Budenz' statement at the Board hearing shows no more than the usual discrepancies when a long and detailed story is told at widely separated intervals of time. The first interviews, which were transcribed on the re-

¹² All of Budenz' statements on these two issues including those before the Board, are set out in the Appendix, *infra*, pp. 316-353; some of these statements or portions of them are quoted in petitioner's brief (Br. 132-137).

cordings, have the most significant discrepancies in comparison with Budenz' testimony before the Board, in that many of the details were left out. But this is not surprising since these were Budenz' first interviews with the F.B.I. and therefore he was recounting all his experiences in the Party over a ten-year period. The subsequent interviews, which are reflected in the notes, were directed to more specific subjects and accordingly Budenz recounted the Starobin and Childs-Weiner episodes with greater precision. The Board therefore found that the documents did not show that Budenz' testimony on the Starobin and Weiner matters was deliberately false (R. 2391), and in affirming this determination, the court of appeals held, "the various accounts given by [Budenz] upon different occasions, under different questioning, of the Starobin and Weiner incidents bear a solid similarity in essentials and differ no more than truthful accounts under such conditions may well differ—indeed, if truthful, do differ—in details, in expressions of speech, and in passing emphasis"¹³ (R. 2703).

¹³ Of course, even details and emphasis may have considerable bearing on the findings as to particular facts of a case. Thus, in regard to the Childs-Weiner incident, it may well be important to the trier of fact whether "Budenz took [a statement of Weiner] to mean that Weiner's source of supply was from foreign countries, particularly Russia" (F.B.I. interview of July 13, 1950 (R. 2367)) or Weiner himself said that "the channels of communication abroad had been broken for the time being, and perhaps could be established" and that Weiner meant "financial aid from Moscow" (testimony before the Board) (R. 1125, 1126). But such difference in detail can have no importance here since the findings based on this testimony have been stricken. And certainly such difference in detail has no substantial effect in impeaching the credibility of the witness on other matters.

Second, the challenged testimony relating to the Starobin and Childs-Weiner matters, even if it were inconsistent with Budenz' statements to the F.B.I., furnishes no basis for striking all of Budenz' other testimony. The challenged testimony related only to a small portion of Budenz' total testimony, comprising only some fifty pages (R. 2299) out of more than seven hundred on all matters. As the Board found, "None of Budenz' other testimony was dependent upon, or inseparable from, his testimony on the Starobin and the Weiner matters" (R. 2392). Since the possibility of showing perjury on the basis of the Starobin and Childs-Weiner recordings and notes was slight, the Board could fairly separate the testimony on which cross-examination was finished from Budenz' testimony on the two matters as to which petitioner had a right to further cross-examination. As to the former testimony, petitioner, having cross-examined Budenz for about five days after two days of direct examination, had substantially accomplished as much as it could with

Petitioner claims that *Jencks v. United States*, 353 U.S. 657, establishes that "only the defense is adequately equipped to determine the effective use of a witness' prior statement for the purpose of impeachment" (Br. 131-132). This language was used, however, in requiring production of prior statements made to the Government by government witnesses—and such production was given petitioner here as to all the statements for which he asked at the original Board hearing. *Jencks* did not hold that testimony must be automatically struck because a witness has become unavailable for cross-examination on the basis of the witness' statements when the statements do not appear inconsistent with the witness' testimony—and *a fortiori* did not hold that, in such circumstances, all the testimony of the witness must be struck, including that on entirely different subjects from that of the statements.

regard to it. Since a cross-examination begun but unfinished suffices if its purposes have been substantially accomplished (5 Wigmore, *Evidence* (3d ed., 1940), § 1390; *Jaiser v. Milligan*, 120 F. Supp. 599, 604 (D. Neb.)), there was no need to strike Budenz' testimony except on the Starobin and Childs-Weiner issues.

Third, there is ample evidence that Budenz' other testimony was at least substantially correct. As the Board found, this testimony was in large measure corroborated "by other credited evidence, either documentary or oral" (R. 2393). As examples, the Board pointed to witness Lautner's testimony that references in petitioner's constitution concerning the upholding of American democracy and the Constitution are incompatible with Marxism-Leninism (R. 975, 979, 1153-1154, 2446-2448) and that Gerhardt Eisler actively participated in petitioner's activities in the 1940's" (R. 874, 969-970, 2526). And the Board further found that much of Budenz' other testimony was "inherently probable from the record and unrebutted" (R. 2393)—such as testimony that Party official Eugene Dennis stated at a meeting at the time of the Hitler-Stalin Pact that, if the United States joined Great Britain in a war against Hitler, petitioner should be prepared to turn the "imperialist" war into a civil war. This evidence is fully consistent with the Marxist-Leninist doctrine of turning imperialist war, i.e., war between capitalist nations, into civil war if conditions are favorable (R. 2427-2428, 2554-2555,

¹⁴ Witness Meyer and Kornfeder also corroborated the latter testimony (R. 321-322, 692-693).

2639). Thus, even if Budenz had lied as to the Starobin and Childs-Weiner incidents, the Board was not required to strike or discredit all his other testimony. As the court of appeals held (R. 2705)—after holding that the discrepancies did not indicate perjury (R. 2703, 2704):

[W]e know of no rule that the trier of facts is required to disregard all the testimony of a witness whom he finds to have testified falsely in one respect. He may do so, but he is not required to do so. Instructions to juries on the point are commonplace in the courtroom. Such instructions are always that the jury *may*—never that it *must*—disregard the testimony of a witness whom it believes to have testified falsely on a material matter as to which he could not be mistaken. A rule of law compelling the trier of facts to disregard all the evidence of such a witness would not only be a revolutionary doctrine in our jurisprudence but a wholly undesirable doctrine.

On this record, it was within the discretion of the Board, as an expert trier of facts, to credit Budenz' other testimony.

Last, and perhaps most important, petitioner has made no effort beyond its original extensive cross-examination of Budenz to show the falsity or inconsistency of Budenz' testimony either on the Starobin and Childs-Weiner matters or on his testimony in general. Joseph Starobin, who Budenz said was the author of the Starobin letter (R. 1136), was still an active Party member and presumably available at the time of the original Board hearings (1951—

1952). While he left the Party before the Board heard petitioner's motion to strike all Budenz' testimony (1958-1959), there is no indication that he could not have been subpoenaed. Jack Stachel, who Budenz testified took the letter from Budenz' hands (R. 1136), was a member of the National Committee throughout this period—from before the original Board hearings to the present—and in 1951-1955 was in a federal prison after conviction for violation of the Smith Act. See *Dennis v. United States*, 341 U.S. 494. Therefore, he, like petitioner's witness Gates who was also in prison, was certainly available at that time. Similarly, Morris Childs and Robert Weiner, who Budenz testified were the two other persons besides himself who were present at the Childs-Weiner conversation (R. 1124-1125), were still available to the Party in 1951-1952 and Childs continued to be in 1958-1959—Weiner having previously died in 1954. As to Budenz' other testimony, the Board found that although he "was specific as to names, dates, and places, none of the persons named by him was called in rebuttal or denial of the events with which they were associated by the witness" (R. 2393).

It seems impossible to believe that petitioner, represented by able counsel, merely neglected to call these obvious and available witnesses with regard to important testimony of an allegedly perjurious witness. Rather, it seems that the reason these witnesses were not called is that, at the least, Budenz' testimony is substantially correct. In any event, petitioner did not attempt, either at the Board's original hearing or on remand, to demonstrate as best it

could that Budenz' testimony was mistaken or perjurious. We submit, therefore, that petitioner is in no position to ask this Court to order the striking of all of Budenz' testimony because one possible means of impeachment—cross-examination based on documents relating to other issues—became impossible.

In sum, we believe that the Board was not even required to strike Budenz' testimony as to the Starobin and Childs-Weiner issues since petitioner made no showing of any substantial discrepancy in Budenz' testimony on these issues. In Wigmore's words, petitioner suffered no "material loss" because of being unable to cross-examine Budenz on the basis of the particular documents which were not produced at the original hearing. Nevertheless, the Board, out of an abundance of caution, struck the findings on these two issues. But certainly the Board was acting within its proper broad discretion as an expert trier of fact in refusing to strike; under these circumstances, Budenz' testimony on entirely separate matters, much of which was corroborated or inherently probable. The Board was not compelled to strike this testimony merely on the faintest possibility that, if petitioner could have cross-examined Budenz on the Starobin and Childs-Weiner matters using the recordings and notes, it might have been able to show not merely inconsistency or forgetfulness but such serious perjury as to taint all the rest of his testimony; and the Board was particularly not compelled to strike this testimony when petitioner had failed to challenge Budenz' testimony either on the two issues; or his other testimony, by calling wit-

nesses who were readily available and could directly challenge Budenz' account of specific facts.

B. THE BOARD'S DENIAL OF PETITIONER'S MOTION TO ORDER THE PRODUCTION OF WITNESS GITLOW'S MEMORANDA TO THE F.B.I. IS NOT REVERSIBLE ERROR.

Benjamin Gitlow, the General Secretary of petitioner from 1928 to 1929 (R. 2647), testified as a witness for the Attorney General. During his testimony he identified and explained a series of Party documents, including minutes of committee meetings, which he had kept during his Party membership and had subsequently given to the F.B.I. (R. 243-264, 1343-1421). During cross-examination of Gitlow, petitioner made a motion for the production of all the documents which petitioner had given the F.B.I., all memoranda prepared by Gitlow explaining these documents, and all other memoranda which either were written by Gitlow or were transcribed by the F.B.I. from oral statements made by him (see R. 2253-2258). The Board denied the motion (R. 2258, 128). After the remand by this Court, petitioner again moved for the production of the Gitlow memoranda and the Board again denied the motion (R. 2187, 2188-2189, 2225). The court of appeals affirmed on the ground that this Court's decision in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, makes petitioner's exclusive remedy a motion for leave to adduce additional evidence under Section 14(a) of the Act ¹⁵ (R. 2660-2664). Petitioner then moved in the

¹⁵ Petitioner is incorrect in saying that the court below held "that the Board had erred in denying petitioner's production" (Br. 140). The court in fact stated: "We do not consider

court of appeals under Section 14(a) for leave to adduce additional evidence (R. 2681-2685), but the court adhered to its earlier decision and held that "the denial of this claim for the production of that material was proper" (R. 2694). Petitioner renewed this contention in its latest appeal to the court below, which held that petitioner's belated motion under Section 14(a) "cannot cure procedural defects *nunc pro tunc* after an appellate court has passed upon his contentions * * *" (R. 2702).

Petitioner contends (Br. 139-141) that the Board's failure to order production of the Gitlow memoranda was erroneous. We submit, however, that, besides petitioner's failure to retain the issue in the case by raising it before this Court on its prior review (see *supra*, pp. 283-287), there are three additional reasons why the Board's action does not constitute reversible error.

1. The Board's order denying production was correct. Petitioner's motion called for the production of all documents Gitlow turned over to the F.B.I., all memoranda prepared by Gitlow explaining these documents, and all other memoranda he had given the F.B.I. (R. 2256). The large majority, however, of the materials included within the ambit of petitioner's motion were not and are not now properly producible. The only materials included within this motion which were producible under either *Jencks v. United States*, 353 U.S. 657, or the so-called Jencks statute, 18 U.S.C.

whether, if the motion to adduce were granted, the Government must then produce, inasmuch as this letter [sic] may involve questions of privilege, relevancy, etc." (R. 2663). Subsequently, the court held that the denial of production was proper (R. 2694).

3500,¹⁶ are the explanatory and other memoranda "touching the events and activities as to which [Gitlow] testified at the trial" (353 U.S. at 668), i.e., "relate to the subject matter of the testimony of the witness" (18 U.S.C. 3500(b)(c)).¹⁷ But petitioner did not carve out of its general motion those memoranda to which it would have been properly entitled. In other words, petitioner's motion constituted, when considered as a whole, a fishing expedition. But this Court in *Jencks*, quoting its earlier decision in *Gordon v. United States*, 344 U.S. 414, 419, emphasized that "[T]he demand was for production of * * * specific documents and did not propose any broad or blind *fishing expedition* among documents possessed by the Government on the chance that something impeaching might turn up" (353 U.S. at 667; emphasis ours). There is certainly no more reason to allow such a fishing expedition in an administrative proceeding involving the hearing of testimony from numerous witnesses over a fourteen-month period.

2. Even if the Board's denial of petitioner's motion was erroneous, it constituted harmless error. Gitlow's testimony (as well as the documents he identified) related entirely to Party activities prior to his expulsion from the Party in 1929 (R. 216). But the evidence as to this period, as to both the "control" and

¹⁶ We assume, as did the court of appeals (R. 2694, 2696, 2703), that the *Jencks* statute may be said to be applicable to the Board's proceedings by analogy.

¹⁷ The Party's own documents were not producible regardless of their relevance since they were not statements made by petitioner or approved by him. See 353 U.S. at 668, 672; 18 U.S.C. 3500(e).

"objectives" requirements of Section 3(3), is clear beyond any doubt. Thus, in its 1921 convention, petitioner adopted a resolution stating that it would "systematically" work "for the destruction of the bourgeois state and the establishment of the proletarian dictatorship based upon Soviet power" (R. 2138; see also R. 2459-2460). That same year, petitioner accepted the twenty-one "Conditions of admission to the Communist International" which required advocacy of the dictatorship of the proletariat, made the national Parties sections of the Communist International, and explicitly bound these sections to accept all resolutions of the Congress and Executive Committee of the International (R. 2139, 2461-2463; see *supra*, pp. 47-49).

Petitioner was required to accept these conditions as long as it remained a section of the International, which was until 1940. Therefore, the Board stated that "it can be found through the hundreds of official documents in evidence alone—the Communist Party began its history by voluntarily submitting to the control of the Soviet Union and adopting that nation's international program for the Communist movement" (R. 2644). The Board concluded that "[t]he only substantial issue of fact is whether upon the announcement in 1940 of its disaffiliation from the Communist International, the latter's dissolution in 1943, or thereafter, [petitioner] ceased its relationship with the Soviet Union or the world Communist movement" (R. 2643). Similarly, the court below held that "[n]o substantial dispute exists as to this area [prior to 1940] of the past" (R. 2138) and that "there is scarcely a dispute as to the period prior to 1940"

(R. 2148). And petitioner's factual argument in this Court is almost entirely based on the contention that, since its disaffiliation from the Communist International in 1940, it has not been a Communist-action organization as defined in the Act (see Br. 12, 20, 21, 22, 98, 99, 100, 101, 106, 108, 111, 117-118, 119, 120, 121-122, 124, 125).

Moreover, the pre-1929 character of the Party is not the crucial issue in this litigation.¹⁸ The Board relied upon the pre-1940 evidence of the Party's character to establish that petitioner satisfied the Act's definition of a Communist-action organization in 1940 at the time of its disaffiliation from the Communist International; it then relied on subsequent evidence to show that neither disaffiliation nor any subsequent events up to the time of the Board's hearing had changed the Party's character. Obviously, the evidence is of increasing importance as it comes closer to the 1940 disaffiliation date. Therefore, except for petitioner's continuing adherence to the Communist International and its "conditions" of membership in 1921 which is undisputed, the pre-1929 evidence is distinctly of secondary importance.¹⁹

¹⁸ Compare petitioner's contention that the pre-1940 evidence and, indeed, the pre-1950 evidence is irrelevant (Br. 105-111). In its brief in the court of appeals after the remand by this Court, petitioner stated (p. 29, fn. 16);

"It is our view that petitioner was not controlled by the International and that the International was not controlled by the Soviet Union. But since we have always considered these questions too remote to be material, we introduced no evidence on the subject and do not now brief it."

¹⁹ It is also significant that the explanatory memoranda were written by Gitlow in the early 1940's, well over ten years after

In *Rosenberg v. United States*, 360 U.S. 367, this Court held, under 18 U.S.C. 3500, that, if the erroneous denial of a motion to order production is harmless, the conviction need not be reversed. Since harmless error does not justify reversal under the Jencks statute in a criminal prosecution,²⁰ *a fortiori* it does not justify reversal when the statute applies only by analogy to impose rules of fairness for all parties in an administrative regulatory proceeding. As this Court said in *Kotteakos v. United States*, 328 U.S. 750, 761-762, the discrimination required in deciding whether an error is technical or substantial "is one of judgment transcending confinement by formula or precise rule. * * *

In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. * * * Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted

the events occurred in the 1920's. The rationale of the *Jencks* case was, *inter alia*, that a witness' pre-trial reports of events might well be more reliable than his trial testimony, since "time dulls treacherous memory" (353 U.S. at 667).

²⁰ Several courts of appeals have also refused, in applying either the *Jencks* case or the statute, to reverse cases on the basis of harmless errors by the trial courts. See, e.g., *United States v. Sheba Bracelets*, 248 F. 2d 134 (C.A. 2), certiorari denied, 355 U.S. 904; *Simms v. United States*, 248 F. 2d 626, 629-630 (C.A. D.C.), certiorari denied *sub nom. Duncan v. United States*, 355 U.S. 875; *Padron v. United States*, 254 F. 2d 574, 576 (C.A. 5), certiorari denied, 358 U.S. 815; *Harris v. United States*, 261 F. 792 (C.A. 9), certiorari denied, 360 U.S. 933; *United States v. Rosenberg*, 257 F. 2d 760 (C.A. 3), affirmed, 360 U.S. 367.

to casting the balance for decision on the case as a whole, are ~~material~~ factors in judgment."

We submit that, applying these standards to this case, the error, if it be one, was clearly harmless. As the Board found, and the court below agreed, the Party's own documents, the validity of which petitioner does not challenge, establish on their face and by themselves the character of petitioner before 1940. Thus, it is as clear as human prognostication can be that impeaching the credibility of Gitlow could not possibly change the Board's ultimate determination.²¹

3. But even if petitioner were correct that the Board erred and that this error was prejudicial, this case is controlled by *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197. Under a provision in the National Labor Relations Act which is substantially the same as Section 14(a) of the Act at bar,²² this Court recognizes that the action of the

²¹ The dissent in *Rosenberg* based its position on the ground that, since "[t]his is not a case in which the statement erroneously withheld from the defense merely duplicated information already in the defense's possession, [t]he defense was denied a letter written by a key government witness shortly before trial making statements which raised serious questions as to her memory of the events about which she testified in considerable detail at the trial" (360 U.S. at 376-377). Here, as we have shown, Gitlow is definitely not a key government witness in any sense. We believe that the facts here satisfy even the minority's strict rule that "an appellate court should order a new trial unless the circumstances justify the conclusion that a finding that such a denial was harmful error would be clearly erroneous" (*id.*, pp. 375-376).

²² Section 14(a) states in pertinent part:

"If either party shall apply to the court [of appeals] for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is mate-

Board in refusing to allow the company to adduce additional "highly important" testimony "was unreasonable and arbitrary" (305 U.S. at 226). Nevertheless, the case was not reversed and remanded to the Board, because the company did not avail itself of the appropriate procedure by applying to the court of appeals for leave to adduce additional evidence as specified in the statute. Accord, *National Labor Relations Board v. Newport News Co.*, 308 U.S. 241, 249-250; *National Labor Relations Board v. Fairchild Engine & Airplane Corp.*, 145 F.2d 214, 215 (C.A. 4); *National Labor Relations Board v. National Laundry Co.*, 138 F.2d 589, 590 (C.A. D.C.); see *California Lumbermen's Council v. Federal Trade Commission*, 103 F.2d 304 (C.A. 9). Similarly, petitioner here has failed to follow the applicable remedy under Section 14(a)—although it knew of the remedy as shown by a motion to adduce evidence as to the credibility of three of the Attorney General's witnesses made prior to the original court of appeals' decision (351 U.S. at 119-120)—and it is therefore now barred, whether or not the Board did in fact err.

Petitioner contends that *Consolidated Edison* is not applicable because "cross-examination * * * is not the introduction of additional evidence" (Br. 141). In actuality, however, cross-examination often produces additional evidence which the trier of fact considers in making its adjudication. The production orders petitioner requested here were preliminary to, and were integrated with, its attempt to adduce additional evidence on cross-examination showing either

rial, the court may order such additional evidence to be taken before the Board * * *."

facts contrary to those stated by the witness or at least that the witness should not be believed. In fact, it is likely that the statements themselves—like the recordings and notes of Budenz' interviews with the F.B.I. (see *supra*, p. 291)—would have been introduced in evidence.

Petitioner also claims (Br. 141) that the court below erred in denying its subsequent motion under Section 14(a). If, however, failure to move to adduce additional evidence could be cured simply by making a subsequent motion, obviously the requirement has no meaning. Indeed, it would be far simpler merely to consider a question presented on appeal as in effect a motion to adduce additional evidence. But this possibility was before this Court in *Consolidated Edison* and was rejected.

Petitioner's difficulties with Section 14(a) clearly reflect the erroneous belief that this provision is merely a procedural technicality. Instead, it serves the useful purpose of allowing interlocutory relief in situations where the administrative agency's time and effort would often be wasted if appeal from the final order were the only remedy. And even if the injured party does not seek interlocutory relief—and Section 14(a) does not seem to compel it—the reviewing court can consider the motion to adduce evidence separately and expedite the remand to the administrative agency if the agency has erred. Nor is petitioner correct in stating (Br. 141) that the *Consolidated Edison* holding would produce multiple interlocutory appeals. Despite the existence of that decision for many years, such multiple appeals have not apparently resulted, probably because administrative agencies generally give parties before them great latitude in adducing evidence.

C. PETITIONER WAS NOT ENTITLED TO MOVE FOR PRODUCTION OF STATEMENTS MADE BY WITNESSES TO THE F.B.I. LONG AFTER THE WITNESSES HAD TESTIFIED AND THE ORIGINAL BOARD HEARING HAD ENDED

After the court of appeals' second²³ decision, petitioner, on February 14, 1958, moved for the first time for the production of all recordings made of Budenz' interviews with the F.B.I., and all memoranda and notes made by the F.B.I. of these interviews, relating to the subject matter of his testimony before the Board²⁴ (R. 2688). The court denied the motion (R. 2694-2695, 2696). On December 29, 1958, petitioner moved before the Board for an order requiring "the production of all statements in the possession of the petitioner made by all of the Attorney General's witnesses on any matters to which their testimony in this proceeding relates" (R. 2338). After the Board denied the motion (R. 2345-2346), petitioner moved under Section 14(a) in the court of appeals for leave to adduce additional evidence (R. 2697). The court properly denied the motion (R. 2702-2703).

Petitioner clearly has no right to production, almost six years after the close of the Board hearing, of documents for the purpose of cross-examination. Conceivably, production would be available if a motion were directed to a limited number of documents and some particular need were shown. But petitioner has

²³ The latter half of this motion is clearly too broad under 18 U.S.C. 3500(e) for it includes statements which were not written or adopted by the witness and are not "a substantially verbatim recital of an oral statement."

merely made two blanket motions for all statements of Budenz and all statements of all the Attorney General's witnesses.²⁴ To grant such motions and allow cross-examination so long after the direct testimony would be seriously unfair to the Government and its witnesses even if it is assumed that, unlike Budenz, the other witnesses are still able to appear. Similarly, it would be unfair, if they were unable to appear, to strike their testimony because of petitioner's belated motion. And the requirement of an entire new round of cross-examination would merely add a new and lengthy delay to a seemingly endless litigation.

Petitioner suggests (Br. 142-144) that it realizes that the motions are seriously out of time by seeking to justify the delay on two grounds. First, petitioner claims (Br. 142-143) that it did not repeat its motions for production at the hearing because the Board had already established a rule denying such motions unless a prior showing of inconsistency was made. But regardless how fixed a position has been taken by a court or administrative agency, a litigant must make clear all exceptions to its rulings. This could have been simply done if petitioner had merely stated at some time during the hearings that it considered itself

²⁴ Under both *Jencks v. United States*, *supra*, and 18 U.S.C. 3500, petitioner would probably have been entitled to the documents stated in its motions (except for a portion of the Budenz motion (see *supra*, p. 311, fn. 23), if the motions had been timely.

entitled, as of right, to all relevant statements made by the Attorney General's witnesses to the F.B.I., and therefore the motion would not be repeated for subsequent witnesses. Moreover, if petitioner had actually intended to move for all the witnesses' statements until the Board's rulings required a showing of inconsistency, presumably petitioner would have attempted to show inconsistency between the testimony on direct examination and the witness' statements to the F.B.I. by thorough cross-examination of the Attorney General's witnesses on the subject of any prior statements. Yet, in many instances, petitioner failed even to attempt this.

Petitioner also contends that it was misled by Budenz' testimony and by the actions of the Board and the Government "into believing that there were no verbatim transcriptions of FBI interviews with Budenz" (Br. 143); thereby, it is alleged, petitioner was misled into failing to make motions for production of Budenz' statements other than those related to the Starobin and Childs-Weiner matters. While Budenz testified that he knew of no verbatim recording of his interviews with the F.B.I. (Tr. 14122),²⁵ we submit the record makes clear that petitioner was not misled in making any motions for production. Petitioner's motions as to Budenz' statements relating to the Starobin and Childs-Weiner matters asked for the production of all of Budenz' reports, not just verbatim transcriptions (R. 1185, 2277-2278). Moreover,

²⁵ Budenz in fact did not know of the recordings (R. 2687).

the motion as to the Starobin reports (Tr. 14125-14129) came after Budenz' testimony that he knew of no verbatim recordings (Tr. 14122). Thus, petitioner's motions were doubtless based in part on Budenz' testimony that F.B.I. agents took notes at the interviews (R. 2686). Thus, petitioner was seeking "reports" which it knew were in existence plus any other reports which might or might not exist. Government counsel in arguing against the motions claimed merely that petitioner had failed to lay a proper basis for the motions by establishing inconsistency between the witness' testimony and prior statements he had made (Tr. 14078-14079, 14130-14131); no claim was even suggested that the reports did not exist. And the Board simply denied the motions without inquiring as to the existence of any "reports." Moreover, despite Budenz' testimony that he knew of no verbatim recordings—including such recordings of his statements on the Starobin and Childs-Weiner matters—petitioner nevertheless renewed its motion before the Board on December 6, 1956, for "[a]ll reports and memoranda of statements made by the witness Budenz to the F.B.I. concerning" the Starobin and Childs-Weiner matters (R. 2217-2220, 2225). This motion was made over a year before the Government disclosed on February 5, 1958, by affidavit, the existence of the recordings of Budenz' initial interviews with the F.B.I. (R. 2685-2687). It is thus clear that petitioner was seeking not only verbatim records but all reports of Budenz relating to the two matters and that it continued to seek them

because there was no indication that such reports did not exist. Petitioner's failure to make similar motions for other reports of Budenz cannot be explained on any theory that it was misled. Petitioner simply and voluntarily failed to make timely motions when it should have, and it was too late to make them years after the close of testimony before the Board.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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APPENDIX

1. THE "CHILDS-WEINER CONVERSATION"

(a) *Budenz' Board testimony.*—Budenz' testimony before the Board on this subject on direct examination, given on April 9, 1952, was as follows (R. 1124-1126; Tr. 13817-13819):

Q. Did you ever have occasion to come to New York with Morris Childs [the leader of the Communist Party in Illinois] in connection with the financing of the paper [the *Midwest Daily Record*, a Party newspaper of which Budenz was editor in 1939]?

* * * * *

The WITNESS: Yes, sir, on several occasions, and specifically in the year 1939, when we were trying to obtain more funds from the Communist Party.

By Mr. PAISLEY:

Q. What occurred on that occasion? A. We had a conference with Robert William Weiner who was then in charge of the Communist Party funds.

Q. Was he an official of the Party? A. He has been treasurer of the Party and president of the International Workers Order, but he always has been in charge of the funds. He later became head of the publishing house, the New Century Publishers. But even during that period he was in charge of all the Party funds and supervision of all the Party financial affairs.

Q. Did you and Morris Childs have a discussion with him with reference to the financing

of the Midwest Record? A. Yes, sir, this was one of the many discussions.

Q. Do you recall what was said? A. Yes, sir. When Weiner said that it was impossible for the Party to put any more money into the Midwest Daily Record, Childs asked him if we couldn't get some money from abroad.

Q. What did he say? A. He said that we could normally, but the channels of communication abroad had been broken for the time being, and perhaps could be re-established so money could come.

Q. Was the word "abroad" used or was there any discussion as to what "abroad" meant?

* * * * *

The WITNESS: That was the terminology which was used very frequently in the Communist Party.

By Mr. PAISLEY:

Q. Was it clarified to you by Weiner what he meant?

* * * * *

The WITNESS: It was not definitely stated what he meant, but that term had been used constantly in the Communist Party as a specific source or center.

* * * * *

Q. What did it mean to you, Mr. Budenz?

* * * * *

The WITNESS: It meant financial aid from Moscow, both because of this terminology and because of experience.

* * * * *

Budenz' testimony before the Board on cross-examination was as follows (R. 1180-1182; Tr. 14061-14070):

Q. You testified that in 1939 you made a trip from Chicago to New York with Morris Childs

to secure some money for the Midwest Daily Record. That was your testimony here? A. That is correct. It may have been the latter part of 1938, but it was in that period. My memory is that it was in early 1939. That is very correct. We had made several of those trips.

Q. Your memory isn't too good on dates, is it? A. Yes, it is good on dates, particularly some that stand out. But that was one of a series of trips made back and forth on this question. Weiner was out in Chicago on the money question, and Childs and I on several occasions were in New York on it.

Q. You testified that you and Childs conferred in New York? A. That is correct.

Q. And you conferred with one Robert Weiner? A. William Weiner, yes.

Q. That Childs asked Weiner if he couldn't get some money from abroad? A. That is correct.

Q. And your testimony here is that Weiner answered that he could normally but channels of communication abroad had been broken for the time being. Was that your testimony? A. That is right.

Q. You testified here that "abroad" meant financial aid from Moscow? A. That is correct.

Q. Mr. Witness, you have had occasion to write or testify about the sources and nature of the finances of the Communist Party in your two books, is that right? A. To some extent.

Q. You did write about that subject matter, did you not? A. Yes, I did.

Q. In your public testimony before various committees as well as in deportation proceedings and in court proceedings and in various other writings you have had occasion to discuss or narrate with reference to the source of Communist Party finances, have you not? A. Yes, sir.

Q. You testified this morning, did you not in one of the early questions I asked you, that you didn't say anything here that you hadn't said anywhere else publicly or that you hadn't written somewhere else publicly? A. That is my remembrance.

Q. That was just this morning. Do you remember being asked that question and making that answer? A. I say that was my remembrance this morning, that I had.

Q. You answered that question that you had not said anything here that you had not either published or about which you testified anywhere else, isn't that right? A. That was my remembrance.

Q. Publicly. Have you ever in any of your books or writings or in your published testimony related this alleged conversation between yourself, Childs and Weiner? A. It is my remembrance that I have somewhere. I certainly have told the Federal Bureau of Investigation about it.

Q. I didn't ask you about that. I didn't ask you what you told the Federal Bureau of Investigation. That is private. I asked where in your writings in your books which have been published or in your public testimony, where you have publicly testified and where the record of your testimony is available, have you testified relating this particular incident that you have related here that is alleged to have taken place between yourself, Childs and Weiner. A. I can't recall for the moment.

Q. You can't recall? Did you do it in your book, This is My Story? A. I don't think so.

Q. You don't think so. There you were telling your story, were you not? A. Well, I wasn't telling it in detail.

Q. Did you do it in your other book, Men Without Faces? A. I don't think I did. I am not sure.

Q. Did you do it when you testified at Foley Square? A. Well, I can't remember. I don't recall that that was brought up.

Q. Did you do it in your first public appearance before the Un-American Activities Committee? A. I am not certain about that. I say to you that I can't recall where I stated that. My remembrance is that I did state it in some testimony. It may have been that I am confusing that with information that I gave the Federal Bureau of Investigation.

Q. I am sorry, I didn't get that after "it may have been." A. I say my remembrance is that I did mention it in some public testimony. It may have been that I have been confusing it with the information that I have given the Federal Bureau of Investigation.

Q. When you say it may have been that you may have been confusing it with the information that you gave to the FBI, what you mean is that you might have given it to the Federal Bureau of Investigation but that you did not give it in any public testimony, is that right? A. That I may not have.

Q. That you may not have. A. Yes, I just can't recall the public testimony for the moment, although my remembrance is that I did testify to that in public testimony.

Q. Where? A. I can't recall for the moment.

Q. This is an important incident that you testified to here. You didn't write about it in This is My Story. You were editor of the Midwest Daily Record, weren't you? A. of the Midwest Record?

Q. Yes. A. Yes.

Q. And its financing was an important incident in your career as editor, was it not? A. Well, it was a problem for the whole Party in Chicago.

Q. But it was also your problem, too, as editor, in the capacity of editor? A. That is right.

Q. You made no mention of it in This is My Story? A. There are many things I left out of This is My Story?

Q. Did you mention it in the Foley Square trial? A. I wasn't asked about that at Foley Square.

Q. Did you mention it in the proceedings of the Teachers? There you testified as an expert, did you not?

* * * * *

Q. In that proceeding you testified as an expert, supposed to have expert knowledge of the Communist Party, isn't that right? A. Yes, sir.

Q. Did you mention this particular incident in that proceeding when you testified as an expert, having full knowledge of the Communist Party?

* * * * *

Q. Did you testify about it in a proceeding before the Subcommittee on Immigration and Naturalization of the Committee on the Judiciary, 81st Congress, in May 1949? A. I don't know.

Q. Did you testify about finances in that proceeding? A. I did in part, yes.

Q. Didn't you make this statement? Page 240:

"The Party has a bigger treasury than you think. It can go out, and finance all the meetings, and it gets the money back, you understand."

Were you asked this question by the Chairman?

"Where does this treasury come from?"

And did you make this answer: "Of my own knowledge I can not say, but it certainly is supposed to come in part from Moscow."

Q. Did you give that answer. A. I may have.

Q. I will show it to you and ask you whether or not you did, starting here (indicating).

The WITNESS: Yes, sir, that is correct.

By Mr. MARCANTONIO:

Q. You did make that statement? A. That is of my own knowledge.

(b) *Prior statements.*—In the course of his initial series of interviews with the F.B.I. in December 1945, Budenz made several references to the financial problems of the Midwest Daily Record, including trips which he made to New York to raise money for it. He also mentioned Weiner's name in replying to a question by one of the interviewing agents as to whether he (Budenz) had any knowledge of "Soviet sources" of Party funds, but made no mention (so far as the recordings reflect) of the Childs-Weiner conversation or other conversation to which Weiner was a party. His pertinent statements were as follows:

Q. Now we'll get on to whatever you want to talk about. A. * * * * Well I'd say, of course, during the time I was in Chicago. I was here in New York once a month on National Committee meetings or something else. The Record was in terrible condition. I had to come here and try to raise money all the time. [C.P. Ex. 97, R. 2358]

A. Now, I'll tell you what I thought I'd do, if you don't mind, make a little summary of my own for you of some things; I mean you indicated some subjects—now, for instance, on

finances—I have just been trying to wonder how I could help you on that. You see we did have financial problems, we had them at both the "Daily Worker" and the "Middlewest Daily Record" but in most of those cases, so as far as I can see, there's nothing there that's of any very great interest as far as I can see. * * *

In regard to the supervision of funds—Oh—the "Middlewest Daily Record" I did tell Father Rowan once that I wished that I could see some of that Moscow money. I mean that, I was very sincere. I was so pressed there we went to the wall that I was trying to get some money very desperately. What did happen though, we did get some money for that paper from the National Office. Now, of course, where this money from the National Office comes, I have no particular means of knowing except the general reports given to the National Committee every so often—Mostly once a year which generally are published, by the way. So they don't tell much, you know.

Q. Have you ever seen any indication of funds coming from Russia or Soviet sources?

A. The only indication would be is that in addition to Krumbein as Treasurer, Weiner still maintains a certain general supervisory control over finances.

Q. Weiner as well as Krumbein? A. That's right. Weiner acts something like Chairman of the Finance Committee. Now you know, he formerly was Treasurer until he got into technical difficulties and if anything would happen it would happen along that line. You see, there's no doubt that he's trusted financially as well as Krumbein. I mean Krumbein is treasurer and acts on the job and all that, but certainly Weiner has to be in on all big decisions. If you are going to make a big move for money from the National Office or anything like that, Weiner has to be consulted. Now, he doesn't sit in regularly, for example, on the

financial committee of the paper or anything like that. * * * [C.P. Ex. 100; R. 2361-2362]

Q. The Party, too, furnishes you money?
A. Oh, I was going to say--they raise the big money. That's where the only possibility would be, see. That's where I could never tell. * * * [C.P. Ex. 100; R. 2362]

* * * I should say that if there is any money that comes from abroad—I don't know whether it is necessary, to tell you the truth, at least not for the publications, they get along pretty well. [C.P. Ex. 100; R. 2363]

* * * Now the only thing that I think is indicative is Weiner's position because I can't see any reason, never did, for Weiner's being a sort of a super, ah—h—that's just surmise, you understand. You must be very careful on that. But I can't see why he's a super financial person. See, unless there's something. [C.P. Ex. 100; R. 2364]

Q. Are there, to your knowledge, any foreign or Soviet funds available in this country to a particular known Communist or otherwise which can be used for the purpose of assisting the Party? A. No. None that I know of—very definitely. [C.P. Ex. 101; R. 2364]

On May 22, 1946 (R. 2343), as reflected in an F.B.I. office memorandum prepared by an agent and dated June 7, 1946, Budenz reported the Childs-Weiner conversation to the F.B.I. (C.P. Ex. 102; R. 2366):

On the question of Soviet funds, Budenz stated that he could recall only one instance wherein it was indicated that the Soviet Union might be sending money to the United States

for the purpose of furthering the efforts of the Communists in disseminating propaganda. This instance occurred when Budenz was affiliated with the Daily Record, Communist organ in Chicago, Illinois. Budenz stated that his newspaper in Chicago was in extremely poor financial condition; that he went to New York to discuss the matter with Communist officials; that he met with Maurice Childs and William Weiner, on which occasion Childs said to Weiner, "Don't you soon expect a consignment from across the sea?" Weiner immediately changed the subject matter, indicating that he did not want to discuss the question of transmission of Soviet funds in the presence of Budenz, even though Budenz was a trusted Communist. Budenz concluded from the remark that was made that funds were actually being sent to this country at that time by the Soviet Union for propaganda purposes.

On February 26, 1947, as indicated in an F.B.I. intra-Bureau letter dated March 4, 1947, Budenz again reported the Childs-Weiner conversation to the F.B.I. (C.P. Ex. 105; R. 2371-2372):

Confidential Informant ND 402 [Budenz] recalled that back in 1939 or thereabout, when the Informant was connected with the Mid-west Daily Record, the Communist Party newspaper in the Mid-west, Childs was on the National Committee and was the District Organizer in the Mid-west, and was also probably on the Political Committee. The Daily Record was in a bad financial condition at the time and both Childs and Confidential Informant ND 402 were anxious to save it. They had a meeting with William Weiner, who controls the finances of the Party, in a restaurant in New York City. Childs suggested that Weiner try to get some money from Moscow to finance the paper. Weiner stated that he had temporarily lost his contacts in Moscow, hence, he could not do any-

thing. Confidential Informant ND 402 stated that prior to Childs requesting Weiner to aid the paper, the paper had been given fifty thousand dollars. Confidential Informant ND 402 did not know where this money came from.

On June 9, 1949, Budenz gave the following testimony before a Congressional committee concerning the Communist Party's "treasury," without mentioning the Childs-Weiner conversation (Hearings before the Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 81st Cong., 1st Sess., on S. 1832, p. 240):¹

Mr. BUDENZ. * * * The party has a bigger treasury than you think. It can go out, and finance all the meetings, and it gets the money back, you understand.

The CHAIRMAN. Where does this treasury come from?

Mr. BUDENZ. Of my own knowledge I cannot say, but it certainly is supposed to come in part from Moscow. * * *

On July 13, 1950, as noted in an F.B.I. office memorandum prepared by a Bureau agent and dated August 2, 1950, Budenz again (for the third time) mentioned the Childs-Weiner conversation to the F.B.I. (C.P. Ex. 103; R. 2367):

In regard to the transmission of funds between Russia, including the satellite countries, and the CP, USA, Budenz advised that he has no direct knowledge of such transmissions. However, he stated that he has always been under the impression that there was such transmissions as the Party needed much more money to carry on its operations than it could possibly raise from dues and its various fund drives.

¹ For Budenz' cross-examination at the Board proceeding on his testimony before the Subcommittee, see *supra*, pp. 321-322.

In this connection reference is made to Bureau letter dated June 2, 1950 instructing to question Budenz regarding a "secret or conspiratorial fund," mentioned in his book "Men Without Faces", and operated by William Weiner and William Browder. Budenz stated that the terms "conspiratorial fund" and "secret fund" are his own terminology. Budenz advised that he had once been informed by William Browder that large sums of money was maintained in bank accounts for Party operations and that Browder had told him this money, at times, totalled a million dollars. Budenz doesn't know if this money was available to the Party, being held in reserve for Moscow or earmarked for various Communist organizations. He stated that this fund was operated by Browder, William Weiner, Lemuel Harris and Jack Childs. Further, that while he was in the Party, particularly during the time he was editor of the Mid-West Daily Record, in Chicago, he had a conversation with Weiner and Mort Childs, CP officials in Chicago at the time, in regard to funds and Childs asked that funds be advanced him by Weiner from the reserve fund and Weiner advised that he didn't have any at that time as his communication system had temporarily broken down. Budenz took this to mean that Weiner's source of supply was from foreign countries, particularly Russia.

2. THE "STAROBIN LETTER"

(a) *Budenz' Board testimony.*—Budenz' testimony before the Board on this subject on direct examination, given April 9, 1952, was as follows (R. 1135-1137):

Q. Did the Daily Worker have any representatives or correspondents covering that conference [the 1945 San Francisco conference at

which the United Nations was organized]? A. Yes, sir.

Q. Who were they? A. Frederick Vanderbilt Field and Joseph Starobin.

Q. Were they members of the Communist Party, USA? A. Yes. Mr. Field was a member of the Communist Party and also had written a column for the *Daily Worker* for some time and was active in Far Eastern affairs for the Communist Party. Joseph Starobin at that time was foreign editor of the *Daily Worker*.

Q. Did you from time to time receive communications from either of them? A. Yes, sir. We steadily received communications, both letters and also we received of course their news reports and comments.

Q. Do you recall any particular communications from Starobin? A. Yes, I do recall a special delivery communication addressed to the editorial board, care of my attention.

Q. Did you receive it yourself? A. Yes, sir, I received it and opened it.

Q. Did you read it? A. In part, yes.

Q. What were the circumstances? A. I opened this letter from San Francisco, which was a statement that D. Z. Manuisky [a former general secretary of the Communist International; at the time in question, the representative of "the Ukraine," U.S.S.R., to the San Francisco conference (Tr. 13840)]—

* * * * *

Q. Yes. Give us the physical surroundings. You said you opened the letter. A. I received the letter at the *Daily Worker* and was reading it when Jack Stachel [the representative of the Communist Party Political Bureau who dealt with the affairs of the *Daily Worker* (R. 1163)] came in.

Mr. ABT: May we have the date, Mr. Chairman?

The WITNESS: It was some time in May 1945. I think it was between the first week in May and May 22. I place that because of certain events. I was reading the letter and I had got partly through when Stachel came in and I said to him, "Look at this important communication we received from Starobin." He glanced at it and said, "Oh, I must take this to the ninth floor immediately." And he took it from me and went upstairs with it, and I never saw it after that, the rest of it.

By Mr. PAISLEY:

Q. Did you try to see it after that? A. No, I didn't make any effort. That is not the way Communists act.

Q. What do you mean by that, Mr. Budenz? A. Things that are referred to the ninth floor, unless the ninth floor refers them back to you you leave it to their discretion.

Q. How much of this letter did you see? A. I saw the beginning of it.

Q. How was it addressed? A. It was addressed to the Editorial Board, my attention as the Managing Editor.

Q. How much of the contents do you now recall?

* * * * *

The WITNESS: In this letter Mr. Starobin stated that D. Z. Manuilsky upon his arrival in San Francisco had expressed indignation at the fact that the American Party had not criticized the American leaders, that is, in the government, more severely, and that The American Party should observe more carefully the guidance and the counsel of the French Communists.

Budenz' testimony before the Board on cross-examination was as follows (R. 1182-1185; Tr. 14094-14125):

Q. You testified that the United Nations conference in San Francisco began some time in February 1945 and ran over until March.

Wasn't that your testimony? A. I think I meant that it was going on in May. I made a slip of the tongue there about March. I know it was in the early part of that year and in the spring.

Q. Let's see exactly what you said, and if there is any modification you want to make, you may make it at that time. At page 11788, line 3:

"Question: Do you recall the conference in San Francisco when the United Nations was being organized?

"Answer: Yes, I do.

"Question: Approximately when was that?

"Answer: That was in the early part of 1945. I think it began some time in February. I wouldn't be absolutely certain. It ran over into March."

Q. That was your testimony, was it not? A. Yes, it was. I had May in mind.

Q. So instead of March you intended to say May? Is that your testimony? A. That is right. Of course even that was an approximation.

Q. So the only change you want to make here is that it ran over into May rather than into March? A. Well, the thing is that that is an approximation. I know that it was in the early part of that year and that it was taking place in May.

Q. So you say it began in the early part of the year; as you say here, in February, is that right? A. That may be too early. The exact month I haven't in mind. It may have been in April. As a matter of fact, it was in the early part of the year. I can recall now about Roosevelt's death. That assists me in the remembrance of the event. It was probably around April.

Q. As a matter of fact, the United Nations conference opened in San Francisco according

to the World Almanac, which I have before me, on April 25, 1945. A. That is probably correct.

Q. Do you accept that date? I will show you the World Almanac. A. Yes. I say Roosevelt's death refreshes my memory on that. It was not yet in session when he died.

Q. So your recollection of the date when the conference opened was incorrect on direct examination? A. Yes. I was giving an approximate time.

Q. You testified that the Starobin letter was received by you in May 1945, is that right? A. I testified it was received in May because it was received after Manuilsky arrived and before the Duclos article was printed or made public.

Q. Let's see exactly how you fixed that time, from your own language, 11789, line 22: In answer to a question by Mr. Paisley. The question in line 17:

"Question: Yes. Give us the physical surroundings. You said you opened the letter.

"Answer: I received the letter at the Daily Worker and was reading it when Jack Stachel came in."

Now line 21:

"Mr. ABT: May we have the date, Mr. Chairman?"

Then did you give this testimony?

"It was some time in May 1945. I think it was between the first week in May and May 22. I place that because of certain events," and so on.

Q. Did you give that testimony? A. That is right.

Q. As to the dates. Can you fix the date any more exactly? A. No, I can not.

Q. You said it was a very short time after Manuilsky arrived. A. That is my impression. It was in that period that I mentioned.

Q. It was your impression. A. It was in that period I mentioned. That is the best I can give.

Q. Between the first week in May and May 22? A. Yes.

Q. So it was shortly after Manuilsky's arrival. That is the way you place it? A. That is the way I remember it, yes.

Q. Manuilsky arrived on May 6, is that right? A. That is what I understand, yes.

Q. That was your testimony? A. Yes.

Q. I beg your pardon. A. Yes, that is my understanding.

Q. So the letter must have been received nearer to May 6 than to May 22. A. I can't be specific, Counsellor. I remember the period and I remember the letter and I remember as much as I have told you of it, but the exact date I don't recall.

Q. Except that you placed it immediately after Manuilsky's arrival. A. Yes. "Immediately" is of course a relative word. It doesn't mean the next day or several days afterwards.

Q. At any rate you fixed the time with respect to the receipt of the letter—you relate it to the arrival of Manuilsky. A. That is right.

Q. So the arrival of Manuilsky is what focuses your attention as to the date of the receipt of the letter? A. Yes, in part, and also I know that it was before the Duclos letter was published.

Q. Was the letter in longhand? A. No, sir. It was typewritten.

Q. Can you give us an idea about how many pages it was? A. It was several pages.

Q. How many? A. I think about three or four. I can't remember the number any more. It was more than one page.

Q. Do you recall whether it was crowded, single spaced or double spaced. A. I don't remember. I think it was single spaced.

Q. On yellow sheets or white sheets? A. White sheets of paper, so far as I remember.

Q. What is that? A. So far as I remember it was on a white sheet of paper.

Q. It is your recollection that it was white sheets. You are not certain? A. No, I am not certain, but I think it was.

Q. Was it hotel stationery? A. No, it was not.

Q. What stationery was it? A. I don't recall, Counsellor.

Q. Was it Daily Worker stationery? A. I think it was, but it may have been plain stationery.

Q. You think that it was but it may have been plain stationery? Can you tell us which it was? A. No, I can not.

Q. You have testified that you read partly through the letter when Stachel took it from you? A. That is correct.

Q. How long had you been reading it when Stachel took it from you? A. Oh, I had just begun to read it a very short time when he came in. We were supposed to have a conference.

Q. Was Stachel in the room when you opened the letter? A. No, he wasn't.

Q. But just as you opened it he came in? A. He came in shortly after I opened it. I was opening a number of letters.

Q. You say that you had read about one-third of the letter when Stachel took it from you? A. I think so.

Q. You have so testified here? A. Yes, about one-third of the letter. I judge that.

Q. So you had not gotten as far down as the signature, had you? A. I looked through. I knew it was from Joe Starobin. It said it on the outside. I also looked through to see who it was from.

Q. And you read one-third of the letter? A. That is right.

Q. You testified here that your recollection of the contents of what you read was as follows: Transcript 11791, line 22:

"In this letter Mr. Starobin stated that D. Z. Manuilsky upon his arrival in San Francisco had expressed indignation at the fact that the American Party had not criticized the American leaders, that is, in the government, more severely, and that the American Party should observe more carefully the guidance and the counsel of the French Communists."

A. That is right.

Q. This is not the first time you have given testimony in public regarding this letter, is it?

A. No, sir.

Q. What was the first time that you testified about this letter in public? A. I know I testified at Foley Square.

Q. As a matter of fact, you testified the first time about this letter in a public appearance before the Un-American Activities Committee on November 22, 1946, did you not? A. I don't recall that.

Q. You don't recall whether that was the first time that you testified about this letter or is it that you don't recall testifying about this letter on that occasion? A. I don't recall that I testified about the letter on that occasion.

Q. You also wrote about the letter in your book, This is My Story, did you not? A. I may have.

Q. You may have. Do you recall whether you did or not? A. I don't recall specifically, but I believe I did.

Q. Your book appeared in 1947, did it not? A. That is right.

Q. When in 1947? A. March, March 17.

Q. Had you completed the manuscript before you testified before the Un-American Activities on November 22, 1946? A. I am not sure. I had to have some revisions, editorial and otherwise.

Q. Let's look at the preface of the book and see if that refreshes your recollection. On page XIII. I call your attention to the date of the preface there and see if that refreshes your recollection, Fordham University, October 11, 1946. A. Yes, but there were changes made in there later. I can't say definitely that—

Q. Yes. I am talking about the first manuscript. A. The first manuscript? Oh, yes, it was ready before.

Q. It was ready before. A. That is right.

Q. So this date, October 11, 1946, fixes the fact that the manuscript had been completed by you prior to your testimony in November 1946. A. That was the original one.

Q. Exactly, the original one. A. Yes.

Q. Mr. Witness, after you wrote this preface and after you had completed the original manuscript did you make any changes with reference to this particular letter? Let me put it this way: Did you make any changes in that portion of the book which dealt with this particular letter, the Manuilsky letter? A. That I do not know. I know I made changes in the book.

Q. You made changes in the book. A. That is right.

Q. But you say that you don't recall whether or not you made any changes in the book that dealt with this particular letter? A. No, I don't recall that.

Q. You don't recall at all. As a matter of fact, you are not sure at this stage whether or not you mentioned that letter in the book, are you? A. I felt that I had, but I wasn't certain.

Q. But you are not certain? A. That is right.

Q. And at this very moment are you certain, whether or not you mentioned this incident in your book? A. I am not certain. I remember the Allen-Stachel debate, but I don't remember the letter particularly.

Q. You don't remember whether or not you made reference to this letter in your book? A. That is right.

Q. In preparation for your testimony here did you review your book on the subject of the Manuilsky letter? A. No, I had no time.

Q. In preparation for your testimony here did you review your testimony before the Un-American Activities Committee on this subject of this letter? A. I did not. I didn't review any previous testimony except that which I have told you about, the things that I reviewed with Mr. Paisley. I didn't have the time to do so.

Q. Mr. Witness, at this point do you recall what you said in your book, if anything, about this Manuilsky letter? A. No, I do not. I haven't looked at the book for a considerable period of time.

Q. Maybe I can help your recollection. Did you write in substance that the Starobin letter said that Manuilsky said that the Party should observe more carefully the guidance and the counsel of the French Communists? A. Yes, that is right.

Q. Your answer is yes, you recall so writing? A. That I know that I have written that somewhere.

Q. I am asking you do you know whether you wrote that in your book. A. No, I don't know.

Q. But you testified here that that is what the letter said? A. That is right.

Q. According to your testimony here, you remember what the letter said but you don't recall whether or not you so mentioned it in your book?

The WITNESS: That is correct. There are certain things that are fastened in your memory. You know that from experience, Counsellor. The full contents of the material I read I haven't given to you, but I have given you the substance of it.

By Mr. MARCANTONIO:

Q. But omitting having written it in your book. As a matter of fact, did you write in your book that the Starobin letter made any reference to the French comrades? Yes or no.

A. I do not recall.

Q. Then I will see if I can refresh your recollection by reading from your own book. A. Very good.

Q. Did you make this statement in your book? I am reading from page 278 of your book entitled *This is My Story*:

"To a very inner group there had been a hint, of course, that the Soviet views were about to change. The most sensational by-product of the San Francisco conference was never published: the whispered orders of D. Z. Manuilsky, boss of the Communist International, to the American Party via the French Comrades. We got wind of this at the *Daily Worker* through a letter from Joseph Starobin, foreign editor of the paper, sent post haste from the conference scene in California. Manuilsky's indirect command did not censor Browder in any way, but it did bluntly order that Stettinius must be fought. However, this was supposedly in order to forward the pledge of Teheran—and so it was conveyed to us. There was not the slightest indication that Manuilsky intended any such drastic operation within the Party as Browder's political execution, though sharp-shooting against the United States officials was not exactly the way Browder had talked. Naturally, the *Daily Worker* leaped to follow the Manuilsky command and increased its slurs and shouts against the Secretary of State."

Did you write that statement? A. I said here via the French Comrades.

Q. That is through the French Comrades. That is what you said, right? A. That was

involved in the matter. That didn't necessarily require that I put in everything that was in the letter there. I mentioned the French Comrades there.

Q. I didn't ask you whether it was necessary or what was necessarily required. I asked you whether or not that is your writing. A. That is correct, Counsellor, but the French Comrades were mentioned there, Manuisky is mentioned there, Starobin's letter is mentioned there.

Q. Yes, we will come to what is mentioned and what is not mentioned. Let me ask you these preliminary questions: Did you write about that letter anywhere else in your book? A. I don't know.

Q. You don't know. Can you tell us by looking at the index whether or not you wrote about this letter anywhere else? A. Yes, I can tell you from the index.

(Witness examining book.)

The WITNESS: That is, if the index is accurate.

Mr. MARCANTONIO: I don't know whether the index is accurate or not. It is your book. You ought to know.

The WITNESS: I would have to go through it. Manuisky and Starobin are only mentioned once.

By Mr. MARCANTONIO:

Q. Will you accept our representation that that is the only place in the book that you mentioned that letter? A. Oh, if that is what you wish, Counsellor, I can do so.

Q. As a matter of fact, you may amine the book during the recess at any time and if we are inaccurate about that, you will tell us so.

Q. You say you don't remember your testimony before the UAC, the Un-American Activities Committee, on this subject? A. No, not in detail.

Q. You don't remember whether you testified about it or not, do you? A. I don't know.

Q. I will try to refresh your recollection on that by showing you your testimony. At page 34 did you make this statement:

"As a matter of fact, right on the eve of the Browder business Joseph Starobin, the foreign editor of the Daily Worker, wrote a very indiscreet letter to the editorial board of the Daily Worker, from whence it was snatched and immediately travelled to the ninth floor. And in that letter he said toward the end of the San Francisco conference, that the French Comrades, who were used largely to beat the Americans, asserted that there should be more of an attack upon Stettinius by the American Communists. He added that this was 'likewise the opinion of Comrade Manuilsky.' This letter was very quickly taken by Stachel and it travelled to the ninth floor and disappeared. This was an instance before Browder's deposition showed how things were going."

Did you make that statement? A. Yes.

* * * *

Q. As a matter of fact, the American Communist Party had criticized American Government leaders before May 6, 1945, when you say Manuilsky arrived in this country, hadn't it? A. Yes, sir, they had.

Q. Did the Daily Worker publish any such criticisms? A. Yes, the Daily Worker had.

* * * *

Q. I show you Exhibit CP-67 for identification, an article by Earl Browder contained in the Daily Worker of May 3, 1945. In that article Mr. Browder states the following:

"The first week of the San Francisco Conference has inescapably raised the ugly question whether the policy of FDR is being abandoned in favor of the policy of Arthur Vandenberg. One thing is certain: America has suf-

ferred a severe moral setback. Whether this is the result of fumbling incapacity, or is a fundamental change of the course may still be debated. What is already beyond debate is the fact that the spirit of FDR did not guide the American delegation's role in the first steps of the United Nations conference."

That was an attack, was it not—A. A criticism.

Q. —on the policy of the United States leaders? A. It was a criticism of Vandenberg.

Q. It was a criticism, was it not? A. It was a criticism.

Q. Of the delegation? A. Of the tendency in the United Nations delegation, yes.

Q. Then under the article we find the following, do we not:

"The answer can not be given in empty words and declamations. It can only be given in deeds. The deed of sponsoring fascist Argentina has an inexorable logic which can only be overcome by equally decisive deeds in the opposite direction. Time is of the essence. America stands at the crossroads."

A. That is correct.

Q. So the whole tenor of the article was one of criticism of the American delegation to the United Nations, was it not? A. That is right.

Q. On the same page we have an article by Joseph Starobin, isn't that correct? A. Yes.

Q. The same person who you say sent that letter? A. That is right.

Q. In that article, Mr. Starobin also makes criticism of the policy and conduct of the United States delegation to the United Nations, does he not? A. Yes, sir. It says Mr. Hull had discussed it with them.

Q. Mr. Witness, you testified before the Un-American Activities Committee that the Starobin letter was received toward the end of the San Francisco conference, is that correct? A.

That was based on my memory. I may have been incorrect about the estimate.

Q. What is that? A. I say it was during that period that I mentioned.

Q. Your testimony before the Un-American Activities Committee—I will read it again—reads as follows:

“And in that letter he”—meaning Starobin—“said toward the end of the San Francisco conference—.”

Q. So in that testimony you fixed the receipt of the letter or the sending of it, as toward the end of the San Francisco conference. A. That was not necessarily accurate. As I said, that was an oral statement made on a great number of subjects, with very quick preparation. I could have been mistaken in that. I don't say that I was, but I could have been mistaken.

Q. You say now that it was not necessarily accurate? A. No, it isn't necessarily accurate, due to the nature of the way in which the statement was prepared and presented, that is, so far as exact dates are concerned or exact events. It was in this period.

Q. The San Francisco conference ended when? A. I do not recall that.

Q. Approximately? A. I do not recall.

Q. Again, I call your attention to the World Almanac, which gives the date of the conference from April 25 to June 26, 1945. Does that refresh your recollection as to the ending of the conference? A. I accept this as correct.

Q. You accept it as correct.

When you testified before the Un-American Activities Committee, that was just about 18 months after this incident took place. A. Yes. I had no material available to consult. I made an oral presentation which, as I say, was prepared very hurriedly, and to my surprise became a presentation rather than a series of questions.

Q. If, as you testified here might have been the case, the Starobin letter was received immediately sometime after May 6, that would have been toward the beginning of the conference rather than toward the end? A. Yes, that is correct.

Q. You testified here that the Duclos article appeared in the World Telegram around May 20 or May 22? A. Along in there. That is the way I remember it.

Q. That is the way you remember it? You remember that? A. Well, I do, because of the time that we had to put it in the Daily Worker. I think we put it in the Daily Worker, that is, so far as I can recall, about May 24, but I may be a little incorrect about the exact date.

Q. So your testimony before the Un-American Activities Committee that the Starobin letter was received toward the end of the San Francisco conference, which we now agree ended on June 26, would place your receipt of the Starobin letter after the World Telegram story? A. That was incorrect. That was inaccurate.

Q. So now you say definitely that your testimony before the Un-American Activities Committee was inaccurate on that score? A. In that respect, yes, that is correct.

Q. Is there anything else with reference to that testimony which you gave before the Un-American Activities Committee on this subject that you would now say is incorrect? A. I didn't say on the subject. I merely mentioned about the dates, the periods.

Q. So I am asking you, is there anything else on that subject besides the date on which you gave testimony to the Un-American Activities Committee which you would say was inaccurate? A. No, I wouldn't say it was inaccurate.

Q. What would you say? A. I would say it was approximately correct, that is, there are different phrasings of the same statement.

Q. Approximately correct? A. Yes.

Q. So the only thing you now say is definitely inaccurate is the matter of the dates?

The WITNESS: May I see the statement, counselor?

Mr. MARCANTONIO: I am showing the witness page 34 of his testimony before the Un-American Activities Committee in November, 1946.

The WITNESS: It is not substantially inaccurate. The phrasing may be added to, because the French comrades were mentioned in that way.

By Mr. MARCANTONIO:

Q. I am not talking about the French comrades. We have gone over that. I am asking you about the date. A. Oh, about the date.

Q. Yes. A. Oh, the date. The date was not at the end of the San Francisco conference. I was in error there. I was considering the period, and the point of the matter is, as I say, this was an oral presentation, and I knew it was in connection with the San Francisco conference, that is all.

Q. You knew it was in connection with the San Francisco conference, but you said in this testimony here, toward the end of the San Francisco conference. A. That is right.

Q. So when you said the end, did you mean toward the beginning, after the beginning, toward the middle, or toward the end. A. I was inaccurate there.

Q. You were inaccurate? A. Yes. I knew it was in connection with the San Francisco conference.

Q. But inaccurate as to whether it was toward the beginning or toward the end. A. That is right. I made a mis-estimate of the time. I had in mind that the conference was concluding in May.

Q. It is now seven years after that incident, and when you testified before the Un-American Activities Committee it was only 18 months after that incident. Prior to your appearance before the Un-American Activities Committee, did you tell the FBI about the Starobin letter? A. That, I wouldn't recall.

Q. You don't recall that. You spent 100 hours with the FBI, or more, you said, before you went there? A. Yes, but the FBI asked me a very great number of questions, and I answered their questions.

Q. But the Manuisky business and the Starobin letter—A. I may have told them, counselor. I say I do not recall. The thing is that—

Q. May I complete my question, please? A. Yes.

Q. The Starobin letter and the Manuisky incident were supposed to be quite important in this setup that you got up against the Communist Party, was it not? You now say you don't recall whether you gave it to the FBI? A. I don't recall the time. The FBI asked me a great number of questions. Undoubtedly if it were in my book, I must have given it to the FBI. The point of the matter is that the FBI particularly at that period, and as a matter of fact this has been the general practice, asked me questions. I do not rush out and volunteer a lot of information, as a rule.

Q. But didn't you regard it as an important incident? A. Oh, sure it was important.

Q. As a matter of fact, you described it in your book, "This is My Story," as--and I quote your language—"the most sensational by-product of the San Francisco conference." Did you not so describe it? A. That, I think, was correct.

Q. Being sensational, you say you don't remember whether you gave it to the FBI or not

prior to your appearance before the Un-American Activities Committee?

* * *

Q. Did you give it to them after your appearance before the Un-American Activities Committee? When I say "them," I mean the FBI. A. I am satisfied I gave it to the FBI. I couldn't say definitely, but the FBI question me about everything I write and say, and also about many other things. They question me, and I answer their questions.

Q. Were your answers reduced to writing? A. As a matter of fact, I do know now, since you mention it, that I did give this to the FBI.

Q. In writing? A. No, not in writing.

Q. Was it taken down by a stenographer. A. No, not by a stenographer. They never do that except in rare cases.

Q. Was a report written up and then shown to you afterwards? A. No, that never happens.

Q. So all you did was simply have an oral conversation about this incident? A. Yes, that is all.

Q. What did you say? A. That is all.

Q. Was it recorded? A. I judge so. It was taken down.

Q. It was taken down? A. Yes. I mean, it wasn't by a stenographer, but by an FBI agent.

* * *

Q. Was it taken down in shorthand or long-hand, or what? A. Longhand.

Q. When? A. That I don't know. The reason I recall it, counselor, if I may say so, is because in connection with my book, everything that was in my book was gone over by the FBI, either before or after its publication.

Q. Let's get that straight now. Everything that was in your book was gone over with the FBI either before or after its publication? A. When I say "gone over," I mean the information was given to them.

Q. Is that right, given to the FBI? A. Right.

Q. Was your report to the FBI about the Starobin letter the same as your testimony before the Un-American Activities Committee?

A. I cannot recall now, counselor. I have given report after report to the FBI. I have answered questions they have asked me, and there have been many, many questions.

Q. Can you tell us whether or not the date that you gave them as to the receipt of the letter with respect to the beginning or the end of the conference, was the same as you gave to the Un-American Activities Committee? A. No, I can not.

Q. Or did it follow your description of the incident in "This is My Story"? A. I think it probably followed the description of the incident in "This is My Story," although there may have been more factors to it than that. I know, as I say, that the various items covered in the book were gone over with the FBI either before or after the book was published.

Q. Let me ask you this question specifically, if you remember: Did you tell the FBI that the Starobin letter was received toward the end of the San Francisco conference? A. I do not recall that. I do not recall their questioning me about the details of the matter. That is, I can not recall the details as presented to them.

Q. Do you recall whether or not you told the FBI that Starobin wrote that it was the French Comrades who said there should be more of an attack by the American party on Stettinius? A. I told them, yes, that, and that that was what Manuilsky said, also.

Q. You remember telling them just that? A. I don't remember specifically, but I know I gave them the substance of this material that we have had before us, that is—

Q. Do you remember specifically whether or not you told them that Starobin wrote that it was the French comrades who said that there

should be more of an attack by the American party on Stettinius? Did you specifically give that report to the FBI? A. I gave the report that this flowed from Manuilsky. . . I don't know the exact phraseology in which I made it. I also referred to the French comrades.

Q. But you don't know whether you specifically made this statement? A. Oh, I couldn't remember that today, no.

(b) *Prior statements.*—In the initial series of interviews with the F.B.I. in December 1945, Budenz was questioned concerning the circumstances under which the short-lived "collaborationist policy" of the Communist Party, under Earl Browder, ended and whether the "instructions relative to this change of policy" may have come from Manuilsky. Budenz mentioned in this connection the "dispatches" which the Party received from Starobin during the period of the San Francisco conference, but made no mention (so far as the recordings which were made of these interviews, without Budenz' knowledge, reflect) of the Starobin letter. His pertinent statements were as follows (C.P. Exs. 99A, 99B; R. 2359-2360):

Q. Now this collaborationist policy (few unintelligible words) this tactic continued on through the November 1944 election, continued on through the rest of the winter and spring of 1945, and apparently it continued up to the time when the San Francisco conference was convened. In fact up until about the second week of the conference when we voted to allow Argentina to enter and at the same time we excluded the Lublin Poles. Is that when the policy ended? * * * A. Well, whether that was the time or not, it was in San Francisco that a great deal of the—ah—I mean when, when it was clear from the—you see Fields and Staro-

bin were in San Francisco, and it was clear from their dispatches—from their private communications sent from Starobin to us, which were very lengthy and disturbed, that we were already attacking the United States and that was pretty early, I should say. I don't know whether it was when Argentina came up. It may have been advance information as to the discussions about it, you see, but at any rate I remember these long reports that came by air-mail special delivery and some were even in wire form, various of these reports, but most of them were by air mail special delivery.

Q. Now, Starobin isn't a big enough man, we certainly feel, to establish that change in policy? A. Oh no, no, no. In fact he isn't even well thought of as a foreign editor today. He's considered to have too many personal slants, you know. * * *

Q. Do you think then that the instructions relative to this change of policy that Starobin and Fields must have received came from the Russian delegation? Oh, you said maybe Manuilsky, the Ukrainian delegate? A. Sure, sure, I mean—after all, they got the atmosphere there. In fact I mentioned Manuilsky very much, because definitely he is a figure in the CI.

Q. He certainly is. A. He used to lay down the law like a general, you know, to his troops. He was there as the Ukrainian President or something.

On May 22, 1946 (R. 2343), as reflected in the F.B.I. office memorandum prepared by an agent and dated June 7, 1946, Budenz reported the Starobin letter to the F.B.I. (C.P. Ex. 102; R. 2365-2366):

When I inquired of Budenz as to the media utilized by the Soviets in getting messages to this country concerning any alteration in the plan, line, or in general international Communist policies, he, in addition to referring to the

sources mentioned above,² described the following incident which will serve to throw some light on this question.

Budenz recalled that, within a few days after the United Nations Conference on International Organization was convened at San Francisco, the Communist Party in this country reversed its policy completely with regard to the question of supporting the United States. Budenz advised that this reversal in policy, as evidenced so completely in the *Daily Worker*, was predicated upon receipt of a lengthy letter which was addressed to Budenz at Party Headquarters in New York City by Joseph Starobin, who was then representing the *Daily Worker* at UNCIO In San Francisco. In this letter, which was considered so highly confidential that Budenz was not permitted to retain it in his office overnight, Starobin advised that "the French comrades have the line and the support of the Soviet Union—and the French comrades blasted Stettinius and the United States Delegation, and therefore Starobin directed that the Party in this country should immediately blast Stettinius and the United States Delegation." Budenz stated that in this letter Starobin inferred that he and/or his associates at the Conference had conferred with Manuilski regarding this question, and that the changed policy was predicated upon Manuilski's instructions as well as on advice received from French Communists at UNCIO.

On November 22, 1946, Budenz referred to the Starobin letter while testifying before the House Committee on Un-American Activities (Hearings before the Committee on Un-American Activities, House of

²The sources referred to were the newspapers *New Times*, *Pravda*, and *Izvestia*, the Bulletin of the Soviet Embassy, Stalin's speeches, "Statements by Dimitrov," and "Statements by Manuilski" (C.P. Ex. 102; R. 2365).

Representatives, 79th Cong., 2d Sess., on H. Res. 5, p. 34:)

* * * As a matter of fact, right on the eve of the Browder business, Joseph Starobin, the foreign editor of the Daily Worker wrote a very indiscreet letter to the editorial board of the Daily Worker, from whence it was snatched up and immediately traveled to the ninth floor. And in that letter he said toward the end of the San Francisco Conference, that the French comrades, who were used largely to beat the Americans, asserted that there should be more of an attack upon Stettinius by the American Communists. He added that this was "likewise the opinion of Comrade Manuelsky [sic]." This letter was very quickly taken by Stachel and it traveled to the ninth floor and disappeared. This was an instance, before Browder's deposition showed how things were going.

In March 1947, Budenz published a book, *This Is My Story*, in which he again mentioned the Starobin letter:

To a very inner group there had been a hint, of course, that the Soviet Views were about to change. The most sensational by-product of the San Francisco conference was never published: the whispered orders of D. Z. Manuilsky, boss of the Communist International, to the American Party via the French Comrades.

* The cross-examination at the Board proceeding concerning this testimony focused on the *time of receipt* of the letter. When it was called to Budenz' attention that the San Francisco Conference began on April 25, 1945, and ended on June 26, 1945, Budenz admitted that the time of receipt of the letter given by him in his Un-American Activities Committee testimony ("toward the end of the San Francisco Conference") was mistaken, since the letter was in fact received nearer the beginning of the conference than the end (see *supra*, pp. 340-344).

* The manuscript for the book had been completed in or about October 1946 (Tr. 14102). For Budenz' cross-examination on this subject at the Board hearing, see *supra*, pp. 331-338.

We got wind of this at the Daily Worker through a letter from Joseph Starobin, foreign editor of the paper, sent post haste from the conference scene in California. Manuilsky's indirect command did not censor [sic] Browder in any way, but it did bluntly order that Stettinius must be fought. However, this was supposedly in order to forward the pledge of Teheran—and so it was conveyed to us. There was not the slightest indication that Manuilsky intended any such drastic operation within the Party as Browder's political execution, though sharpshooting against the United States officials was not exactly the way Browder had talked. Naturally, the Daily Worker leaped to follow the Manuilsky command and increase its slurs and shouts against the Secretary of State.

On March 24, 1949, Budenz again referred to the subject letter in testifying as a government witness in *Dennis v. United States*, 341 U.S. 494. His pertinent testimony was as follows (Supreme Court Record, No. 336, Oct. Term, 1950, pp. 3511-3512, 3514-3515):

Q. While Mr. Starobin and Mr. Fields were in San Francisco did you receive any communications from either of them? A. Yes, sir. I received several communications but one specifically from Mr. Starobin.

Q. And the one specific one from Mr. Starobin, how was that addressed? A. That was addressed to the Editorial Board of the Daily Worker, my attention.

Q. When you received that letter did you do anything about reading it? A. I began to read it, yes, sir.

Q. And who was present when you began to read it? A. Jack Stachel.

* * * * *

Q. Can you recall when it was that you received it? A. It was—it was in between the

time that D. Z. Manuilsky of the Ukraine Delegation arrived in San Francisco—

Q. Well— A. It was in May of that year.

Q. Do you remember the date? A. Not the specific date. It lay between the time that D. Z. Manuilsky—

A. (Continuing) It lay between the arrival of D. Z. Manuilsky of the Ukraine Delegation in San Francisco and the publication of the Jacques Duclos articles attacking Earl Browder.

Q. I think you said that you read part of the letter and the defendant Stachel was there? A. That is correct. I was reading the letter when he entered the room.

Q. And what happened after he entered the room? A. I had read a portion of the letter and showed him that portion which I had read and he snatched the letter up and said he had to take it upstairs to the 9th floor.

Q. Where were you when you were reading this letter? A. In the offices of the Daily Worker, the managing editor's office.

Q. After Mr. Stachel took the letter from you to the 9th floor did you ever see it again? A. No, sir, I did not.

Q. Will you tell the Judge and the jury what your best recollection of what was in the letter is?

A. The letter up to the point where I had read it stated that Comrade Manuilsky was indignant at the American Party for not having criticized American officials more severely and particularly the Secretary of State and that French comrades had been given the commission to instruct the American comrades as to how to act in these matters. That is not the exact verbiage

of this letter but that is a summary of the letter up to the point where I had read it.

Q. You said that the French comrades had been instructed to tell the American comrades?

A. That the French comrades had been instructed to advise the American comrades of these matters.⁵

⁵Although Budenz told the examining attorney in the course of his cross-examination in the original proceeding before the Board in this case that he had "testified [about the Starobin letter] at Foley Square [i.e., at the *Dennis* trial]" (Tr. 14101), the attorney did not cross-examine him concerning his *Dennis* testimony.

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